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## Discriminatory Cooperative Federalism

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## Articles

### DISCRIMINATORY COOPERATIVE FEDERALISM

AVA AYERS\*

#### ABSTRACT

Under the Equal Protection Clause, states can't (with certain exceptions) discriminate against noncitizens. But Congress can. Sometimes, Congress tries to share this power to discriminate with states. This Article looks at cases in which Congress supports state discrimination using cooperative federalism. (The phrase "cooperative federalism" refers to a form of lawmaking in which Congress induces or allows states to play a role in federally-created regulatory schemes.)

For example, multiple provisions of the Welfare Reform Act of 1996 aim to encourage states to deny public benefits to noncitizens. The Welfare Reform Act attempts to work around the Equal Protection Clause by sharing with the states Congress's plenary power to treat noncitizens differently. It thus represents a form of cooperative federalism whose goal is discrimination.

Cooperative-federalism schemes require the involvement of two actors, federal and subfederal, each subject to their own legal constraints. In the immigration context, discriminatory cooperative federalism is vulnerable to challenges aimed at the federal actions (like claims that Congress

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\* Assistant Professor of Law and Director of the Government Law Center, Albany Law School. She/her pronouns. Before announcing my gender transition, I published several articles under the name "Andrew B. Ayers"; I would be grateful to anyone who wants to cite those articles if they would use "Ava Ayers" as the author's name.

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has impermissibly delegated its power) and challenges aimed at the states' actions (like equal-protection challenges). Distinguishing the federal and state components of these challenges significantly clarifies the analytical picture, and, for advocates, the plan of attack.

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## INTRODUCTION

CAN the federal government share with states its power to discriminate against noncitizens? Courts have puzzled over this question for decades,<sup>1</sup> and scholars have attacked it from a variety of angles,<sup>2</sup> but no approach has emerged as dominant. This Article suggests that there's good reason for that: what appears at first glance to be one problem is, in fact, many.

Federal statutes sometimes purport to authorize states to decide for themselves whether to offer public benefits and licenses to noncitizens. Many of the most important provisions in this area are part of the Welfare Reform Act of 1996, a major piece of legislation that limited noncitizens' eligibility not only for state and federal public assistance, but also for other benefits as diverse as professional licenses, public contracts, and higher education assistance.<sup>3</sup>

Ordinarily, it would be unconstitutional for states to deny benefits to noncitizens if they offered those benefits to citizens. Under the Equal Protection Clause, state laws that distinguish between citizens and noncitizens

1. See *Graham v. Richardson*, 403 U.S. 365, 382–83 (1971); *Bruns v. Mayhew*, 750 F.3d 61, 70 (1st Cir. 2014); *Korab v. Fink*, 797 F.3d 572, 581 (9th Cir. 2014); *Pimentel v. Dreyfus*, 670 F.3d 1096, 1100–08 (9th Cir. 2012); *Soskin v. Reinertson*, 353 F.3d 1242, 1254–57 (10th Cir. 2004); *Hong Pham v. Starkowski*, 300 Conn. 412, 416–17 (2011); *Ehrlich v. Perez*, 394 Md. 691, 725–26 (2006); *Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 233–34 (2012); *Doe v. Comm'r of Transitional Assistance*, 437 Mass. 521, 773 N.E.2d 404, 407–08 (2002); *Khrapunskiy v. Doar*, 12 N.Y.3d 478, 482 (2009); *In re Aliessa v. Novello*, 96 N.Y.2d 418, 433–34 (2001).

2. See Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591 (1994); Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357 (2002); William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387 (1983); Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77 (2016) [hereinafter Condon, *Equal Protection for Immigrants*]; Roger C. Hartley, *Congressional Devolution of Immigration Policymaking: A Separation of Powers Critique*, 2 DUKE J. CONST. L. & PUB. POL'Y 93 (2007); Gregory T. W. Rosenberg, *Alienating Aliens: Equal Protection Violations in the Structures of State Public-Benefit Schemes*, 16 U. PA. J. CONST. L. 1417 (2014); Anna C. Tavis, *Healthcare for All: Ensuring States Comply with the Equal Protection Rights of Legal Immigrants*, 51 B.C. L. REV. 1627 (2010); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001); David Wurzburg, *Legalized Discrimination? Not in My State: State-Court Challenges to the Discriminatory Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 21 GEO. J. POVERTY L. & POL'Y 251 (2014). Note, *The Constitutionality of Immigration Federalism*, 118 HARV. L. REV. 2247 (2005) [hereinafter *Immigration Federalism*].

3. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Welfare Reform Act," sometimes referred to as "PRWORA"), Pub. L. No. 104-93, §§ 400–451, 110 Stat. 2105, 2261–76 (codified as amended 8 U.S.C. §§ 1601–1666). For an overview of how states in the years immediately following the act's passage responded to the authority to deny benefits that the act granted them, see Wishnie, *supra* note 2, at 515–17. For a discussion of specific benefits, see Part I below.

must satisfy strict scrutiny.<sup>4</sup> So must state laws that draw a line between different groups or categories of noncitizens.<sup>5</sup> Congress, unlike states, has the power to distinguish between citizens and noncitizens.<sup>6</sup> Statutes like the Welfare Reform Act try to share that power to discriminate with the states. Part I of this Article maps out the different ways in which Congress attempts to authorize or support discrimination against noncitizens.

Statutory frameworks in which Congress tries to give states discretion to discriminate, I argue, should be understood as a form of cooperative federalism. In traditional cooperative-federalism frameworks, Congress uses various powers, including preemption and the Spending Clause power, to induce states to participate in federal programs or regulate in ways Congress approves of.<sup>7</sup> Statutes like the Welfare Reform Act function similarly, but instead of inducing states to participate in federal programs or comply with federal standards, they aim to give states discretion that would otherwise be forbidden by the Equal Protection Clause.

Cooperative-federalism schemes involve two sets of actions: the federal government's actions that create and maintain the scheme, and the subfederal governments' actions that fulfill their role in it.<sup>8</sup> Each actor, the federal and the subfederal, is subject to its own set of legal constraints. For example, subfederal actors may be subject to limitations under state

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4. *See, e.g.*, *Bernal v. Fainter*, 467 U.S. 216, 219–20 (1984) (citizenship requirement for state notaries public is subject to strict scrutiny); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 601–02 (1976); *In re Griffiths*, 413 U.S. 717, 721 (1973); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973).

5. *Nyquist v. Mauclet*, 432 U.S. 1, 8–9 (1977).

6. *See Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

7. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 308 (1980) (describing Medicaid as a “system of ‘cooperative federalism’” in which “if a State agrees to establish a Medicaid plan that satisfies the requirements of Title XIX, which include several mandatory categories of health services, the Federal Government agrees to pay a specified percentage of ‘the total amount expended . . . as medical assistance under the State plan.’” (citation omitted) (quoting *King v. Smith*, 392 U.S. 309, 316 (1968); 42 U.S.C. § 1396b(a)(1))); *see also* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1479 (2018) (describing as “cooperative federalism” a regulatory scheme in which “Congress enacted a statute that comprehensively regulated surface coal mining and offered States the choice of ‘either implement[ing]’ the federal program ‘or else yield[ing] to a federally administered regulatory program.’” (alterations in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 268 (1981) (discussing the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201 et seq. (1976 & Supp. III)))).

8. The Ninth Circuit majority in *Korab v. Fink* criticizes the dissent for seeming to question both the constitutionality of the state’s action and the constitutionality of the federal action that authorized it. Some scholars sometimes confuse the two analyses: Carrasco, for example, writes that when Congress enacted the Immigration Reform and Control Act (IRCA), it “enunciated no interest that would satisfy the Court’s heightened review.” Carrasco, *supra* note 2, at 616. But heightened review applies to state actions, not federal actions.

constitutions, which can't bind the federal government. And the United States Constitution imposes structural constraints on Congress that are not relevant to state actions.

This means that cooperative-federalism schemes are subject to two sets of challenges: those based on constraints that apply to the federal government, and those based on constraints that apply to the subfederal actors that implement cooperative-federalism schemes. In the case of cooperative-federalism schemes intended to enable state discrimination against noncitizens, we should expect (and this Article explores) a multiplicity of potential challenges, not just one.

Whenever Congress supports state discrimination, two actions are required: the congressional action supporting the state discrimination, and the state's action that discriminates. Both actions are independently subject to challenges. And those challenges may be logically independent of one another. In other words, even if challenges to the federal act fail, challenges to the state act may succeed, and vice versa.

Part II of this Article analyzes three challenges that are directed at the federal role in discriminatory cooperative federalism. The first challenge argues that when a federal statute allows states to make different choices about whether to discriminate against noncitizens, that statute does not constitute a "uniform" rule, and thus violates a requirement of the United States Constitution.<sup>9</sup> The second challenge argues that statutes like the Welfare Reform Act don't deserve judicial deference because they are not really "immigration" laws at all, in the sense that they don't regulate movement across borders. A third challenge argues that the federal power, assuming it exists, is nondelegable, and thus statutes like the Welfare Reform Act impermissibly attempt to share a power that can't be shared.

Part III of the Article analyzes the most important challenge to the subfederal role in discriminatory cooperative federalism: the equal-protection challenge. Courts have struggled to decide what role, if any, federal approval should play in equal-protection analysis of state discrimination against noncitizens. The analysis in Part II, which outlines several challenges to Congress's power to enact discriminatory cooperative-federalism schemes, lays the groundwork for a clearer understanding of the role federal approval plays in an equal-protection analysis. Or so Part III will try to show.

This case study of discriminatory cooperative federalism sheds some light on larger debates about the value of cooperative federalism as such. The Supreme Court has long spoken glowingly about statutory schemes in which the federal government uses powers like preemption or the Spending Clause power to create programs in which state and local governments play an active role.<sup>10</sup> On the other hand, some commenters see coopera-

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9. See *infra* Part II.

10. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 630 (2012) (Ginsburg, J., concurring) ("[U]ndoubtedly the interests of federalism are better

tive federalism as undermining states by coopting them into participating in schemes they would not otherwise join; these commenters argue that it would be better to revert to a “dual federalism” model in which the federal government and the states regulated in parallel, not together.<sup>11</sup>

These generalizations assume that cooperative federalism can be fairly characterized as good or bad intrinsically, or in general. But the value of cooperative federalism may depend on the uses to which it is put. This Article presents a stark example of how the tools of cooperative federalism have been used to accomplish harmful ends.<sup>12</sup>

### I. HOW CONGRESS SUPPORTS STATE DISCRIMINATION

Congress supports discrimination in different ways. Past scholarly analyses identified discrete challenges to discriminatory cooperative federalist schemes.<sup>13</sup> This Article aims to contribute to that literature by putting the pieces together and showing the multiplicity of challenges to such schemes. Congressional support for state discrimination gives rise to problems in multiple doctrinal categories: equal protection, federal preemption, state sovereignty, judicial independence, and more. So there are multiple rules or analyses that might govern any challenge to a specific statute that supports state discrimination.

What is needed, to lay the groundwork for clear understanding, is taxonomy: first, a taxonomy of the ways in which Congress supports state discrimination against noncitizens, and, second, a taxonomy of the challenges that might be brought against those various forms of support for state discrimination.

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served when States retain a meaningful role in the implementation of a program of such importance.”); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005); *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002) (Medicaid “is designed to advance cooperative federalism” (citing *Harris v. McRae*, 448 U.S. 297, 308 (1980))); *California v. United States*, 438 U.S. 645, 650 (1978); *King v. Smith*, 392 U.S. 309 (1968).

11. See, e.g., Michael S. Greve, *Against Cooperative Federalism*, 70 *MISS. L.J.* 557 (2000).

12. The word “discrimination” can be used descriptively or normatively. In its descriptive sense, it indicates the mere fact of differential treatment, with no implied value-judgment about whether the differential treatment is appropriate. In its normative sense, “discrimination” connotes a practice that is morally wrong. In this Article, the word is generally used in both senses: I do in fact hold, and might as well disclose, the belief that the differential treatment at issue is wrong. However, a reader who does not share that belief might still be persuaded by the arguments to follow. The Article’s goal is to show why existing legal doctrine supports multiple strong challenges to congressional actions designed to authorize or justify states’ differential treatment of noncitizens. Even someone who supports that differential treatment as a policy matter might recognize doctrinal problems with it.

13. For example, Wishnie explains why such schemes represent an impermissible devolution of power to the states, while Condon argues that equal-protection doctrine (once it is appropriately disentangled from preemption doctrine) bars state discrimination. See Wishnie, *supra* note 2, at 493; Condon, *Equal Protection for Immigrants*, *supra* note 2, at 77–78.



### A. *The Tools Congress Can Use to Support State Discrimination*

Congress uses various tools, powers, or mechanisms to support or encourage state discrimination. This Section of the Article looks at three: cooperative federalism; the plenary-power doctrine, under which courts give extreme deference to Congress on immigration matters; and the indirect effects of federal schemes.

#### 1. *The Plenary Power*

One tool that makes it possible for Congress to support discrimination against noncitizens is its so-called “plenary power” over matters related to immigration.<sup>14</sup> Under the plenary-power doctrine, federal courts give extreme deference to Congress and the President on questions of immigration policy. As Justice Frankfurter wrote, “[T]he underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions . . . .”<sup>15</sup>

A long series of Supreme Court cases upheld the power in the context of regulation of exclusion and removal from the United States.<sup>16</sup> And the

14. See T. Alexander Aleinikoff, *Citizens, Aliens, Membership, and the Constitution*, 7 CONST. COMMENT. 9, 10 (1990); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) [hereinafter Motomura, *Plenary Power*]; cf. Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (questioning the idea that the idea of a plenary-power doctrine is necessary to explain Supreme Court precedent).

15. *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) (discussed in Aleinikoff, *supra* note 14, at 10).

16. See *Reno v. Flores*, 507 U.S. 292, 305–06 (1993) (deferential review of detention of noncitizens during immigration proceedings); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (admission: “[O]ver no conceivable subject is the legislative power of Congress more complete.” (internal quotation marks omitted) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (exclusion); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (procedures); *Harisiades*, 342 U.S. 580 (deportation); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (procedures: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”); *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”). The doctrine thus leaves to Executive Branch agencies significant responsibility for the application of constitutional norms, but they have not lived up to that responsibility. See Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 486 (2018). Some scholars saw the cases of *Zavaydas v. Davis*, 533 U.S. 688 (2001), and *Nguyen v. INS*, 533 U.S. 53 (2001), as a partial retreat from the plenary-power doc-

Court also applied plenary-power deference to decisions about federal public benefits in *Mathews v. Diaz*.<sup>17</sup> Exploring this trend, Kerry Abrams has documented ways in which the Supreme Court has used the plenary-power doctrine not only to uphold federal laws against equal-protection challenges, but also to find state laws affecting noncitizens preempted.<sup>18</sup>

The rationale for the doctrine has to do with immigration's centrality in foreign relations, and the deference traditionally afforded the executive and legislative branches in foreign-relations matters.<sup>19</sup> In the early case of *Chy Lung v. Freeman*,<sup>20</sup> the Court said that only the federal government could exercise power over immigration because "[i]f it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."<sup>21</sup> And in *Diaz* the Court wrote that "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution."<sup>22</sup> It then cited *Baker v. Carr*,<sup>23</sup> on non-justiciable political questions,<sup>24</sup> and wrote that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."<sup>25</sup> In a related context, the Supreme Court has

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trine. See Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002). The recent case of *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) points in the same direction, applying intermediate scrutiny to a gender-based classification in the law of citizenship. See *id.* at 1698. But see Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 152 (2018) ("In spite of some signs of a departure from the plenary power doctrine, the Court still gives significant deference to Congress in the area of immigration law." (footnote omitted)). The plenary-power doctrine came roaring back (if indeed it had ever gone anywhere) in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), which upheld the Trump Administration's ban on entry from certain primarily Muslim countries against a First Amendment challenge, despite statements by the President that nakedly described his anti-Muslim bias as the reason for the ban. *Id.* at 2418. It explicitly invoked the plenary-power doctrine in doing so. *Id.* at 2419.

17. See 426 U.S. 67 (1976).

18. See Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013).

19. See *Fiallo*, 430 U.S. at 796 (discussing foreign-affairs rationale for plenary power); *Galvan v. Press*, 347 U.S. 522, 530 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security."); *Chae Chan Ping*, 130 U.S. at 609; see also David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 145 (2013) (discussing criticism of the foreign-affairs rationale); Spiro, *supra* note 16, at 340 ("The inherent international element of immigration decisionmaking perhaps best explains the origins of the plenary power doctrine and its persistence through the rights revolution in other contexts.").

20. 92 U.S. 275 (1875).

21. *Id.* at 280.

22. *Diaz*, 426 U.S. at 81.

23. 369 U.S. 186 (1962).

24. *Id.* at 217.

25. *Diaz*, 426 U.S. at 81–82.

noted that “[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.”<sup>26</sup> The Court reasoned that fifty-one actors in this arena would be too many: “It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”<sup>27</sup>

The plenary-power doctrine functions as a peculiar carve-out from equal-protection doctrine.<sup>28</sup> Scholars have long attacked the plenary-power doctrine, placing it firmly in “a sort of constitutional hall of shame.”<sup>29</sup> In particular, they have criticized the foreign-affairs rationale. Gerald Neuman, for example, wryly wondered how our foreign affairs might have been disrupted had the Court struck down in *Fiallo v. Bell*<sup>30</sup> rules that discriminated on the basis of gender and illegitimacy in the granting of immigration status.<sup>31</sup> Peter Margulies has proposed an approach to judicial review of federal immigration policies under which courts would examine, among other factors, the “degree of sovereign interest” in any specific policy.<sup>32</sup> Hardly anyone in academia is a fan of the current approach. Nonetheless, it works in conjunction with the tools of cooperative federalism to make possible federal support for state discrimination against noncitizens.

The plenary power allows Congress to simply command states to deny benefits to noncitizens.<sup>33</sup> Conceptually, this may not amount to *state* discrimination, because it is arguably the federal government that discrimi-

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26. *Arizona v. United States*, 567 U.S. 387, 395 (2012) (discussing preemption of state laws that affect immigration); *see also id.* (“Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.”).

27. *Id.*

28. *See* Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563, 575 (2017) [hereinafter Condon, *Equal Protection Exceptionalism*].

29. *See* Spiro, *supra* note 16, at 340. For criticism of the doctrine, *see*, e.g., GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 118–38 (1996). Catherine Kim shows how the doctrine can be attacked from the perspective of administrative law (as opposed to equal protection), as part of a movement toward greater judicial scrutiny of agency action. Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77 (2017) (describing a project of “contextualizing the judiciary’s willingness to review immigration decisions within a broader administrative law project to strengthen judicial checks on the growing authority of agency officials across the regulatory state”).

30. 430 U.S. 787 (1977).

31. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1898 (1993).

32. Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 8 (2018).

33. In cases where federal statutes command a denial of benefits, courts typically apply rational basis scrutiny. *See* *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001); *Aleman v. Glickman*, 217 F.3d 1191, 1197 (9th Cir. 2000); *City of Chi-*

nates when it denies states all choice in the matter. Nonetheless, it is important that Congress can simply prohibit states from treating noncitizens equally. Cooperative-federalism schemes are an alternative to outright commands of that kind.

## 2. *Cooperative Federalism*

Cooperative-federalism schemes are another important tool Congress can use to support state discrimination against noncitizens. Cooperative federalism is itself a collection of tools. Two of the most important are conditional grants and conditional preemption. These can be thought of as a carrot and a stick, respectively.<sup>34</sup>

Conditional grants are the carrot: if states participate in a given federal scheme, Congress (using its power under the Spending Clause) gives those states money.<sup>35</sup> Conditional preemption is the stick: if states fail to participate in the federal scheme, the states are preempted and not allowed to exercise regulatory power in the relevant area.<sup>36</sup> Both mechanisms involve inducing states to act, rather than compelling them to do so. The reason for calling these laws cooperative federalism is that they in-

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cago v. Shalala, 189 F.3d 598, 603–05 (7th Cir. 1999); *Rodriguez v. United States*, 169 F.3d 1342, 1346–50 (11th Cir. 1999).

34. Cf. Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 205–06 (1997) (“[C]ooperative federalism’ comes in many forms. Congress may: (1) use federal funds as a ‘carrot’ to induce states to regulate; [or] (2) require federal agencies to impose the ‘stick’ of preemptive federal requirements if states do not regulate as desired”; also discussing constitutional concerns with other forms in which Congress may “(3) delegate federal powers to states” or “(4) direct states to implement federal programs”).

Another form of cooperative federalism is one in which states are given a voice in a federal decision-making process. Section 401 of the Clean Water Act creates a process for state involvement in federal agencies’ decisions about whether to approve projects that might result in discharges of pollutants into navigable waters. See 33 U.S.C. § 1341(a)(1) (2018). Before the federal agency can approve such a project, the relevant state must certify that it will comply with “effluent limitations” and “any other appropriate requirements of State law.” *Id.* § 1341(d). See generally U.S. ENVTL. PROTECTION AGENCY, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (2010), <https://www.nrc.gov/docs/ML1121/ML112160635.pdf> [<https://perma.cc/3BBW-VZ6K>] (subject to review under *Executive Order on Promoting Energy Infrastructure and Economic Growth*, Exec. Order No. 13,868, 84 Fed. Reg. 15,495 (Apr. 10, 2019), <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-energy-infrastructure-economic-growth/> [<https://perma.cc/234P-LUPH>]).

35. *New York v. United States*, 505 U.S. 144, 167 (1992); see also U.S. CONST. art. I, § 8, cl. 1 (Congress may “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (under Congress’s spending power, “Congress may attach conditions on the receipt of federal funds”).

36. See *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). For an overview of cooperative federalism, and the cases that have upheld it, see Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668–77 (2001).

volve “a shared federal and state government responsibility for standard setting, funding, and enforcement.”<sup>37</sup>

Discriminatory cooperative federalism uses both carrots and sticks. One example of a carrot is Medicaid, a program jointly funded by the federal government and the states, which is governed by federal rules.<sup>38</sup> Congress sets conditions of eligibility for this program that treat citizens and noncitizens differently. The federal funds at issue are an enormous incentive for states to participate against noncitizens, and thus to discriminate.<sup>39</sup>

An example of a stick is 8 U.S.C. § 1621, a statute I’ll call “the Benefits Bar,” which conditionally preempts states that wish to offer public benefits to certain noncitizens. First, the Benefits Bar provides that states cannot offer public benefits to noncitizens unless their immigration status is on a list of eligible statuses.<sup>40</sup> For any noncitizen who can’t find their status on

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37. John D. Edgcomb, Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TUL. L. REV. 299, 299 (1983).

38. *Medicaid: An Overview*, CONG. RES. SERV. (Aug. 3, 2015), [https://www.everycrsreport.com/files/20150803\\_R43357\\_3f72428cda68b780d876e71160397a398e182b7a.pdf](https://www.everycrsreport.com/files/20150803_R43357_3f72428cda68b780d876e71160397a398e182b7a.pdf) [<https://perma.cc/8AAV-LMV3>].

39. Medicaid is such a massive program that the threatened loss of Medicaid funds was found unacceptably coercive in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, 575–82 (2012).

40. That list includes “qualified aliens,” a category that includes legal permanent residents, asylees, refugees, and other humanitarian statuses. See 8 U.S.C. § 1641 (2018). The list also includes nonimmigrants and certain parolees. 8 U.S.C. § 1621(a), (c) (2018). Who is a “nonimmigrant”? Generally, the term is defined in 8 U.S.C. § 1101(a)(15), which describes temporary or conditional statuses like student visas, temporary work visas, and others. But Jennesa Calvo-Friedman points out that the version of section 1621 that was passed by Congress, and published in the Statutes at Large, “defines eligible nonimmigrants as ‘a nonimmigrant under the Immigration and Nationality Act.’” Jennesa Calvo-Friedman, *The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis*, 102 GEO. L.J. 1597, 1626 (2014). The U.S. Code version adds bracketed text suggesting that the term “nonimmigrant” is limited to the statuses listed in 8 U.S.C. § 1101: “a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.]” 8 U.S.C. § 1621(a)(2) (2018). Calvo-Friedman uses this observation to argue that the term “nonimmigrant” thus includes not only those listed in section 1101, but all lawfully present noncitizens who are not lawful permanent residents. Calvo-Friedman, *supra*, at 1627. A response to this argument might be that if Congress meant to include all lawfully present noncitizens in the category “nonimmigrant,” it would not have needed to separately list as eligible “an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182(d)(5)] for less than one year.” 8 U.S.C. § 1621(a)(3) (2018). To be sure, Calvo-Friedman’s reading renders that provision hard to explain. But her reading elegantly explains a different, otherwise-inexplicable feature of the statute: the fact that section 1621(d) authorizes states to grant eligibility (by enactment of a state law after 1996) to “an alien who is *not* lawfully present in the United States” but not a noncitizen who *is* lawfully present. *Id.* § 1621(d) (emphasis added). Why would Congress have wanted to allow states to give benefits to unlawfully present people, but not lawfully present people in statuses like Temporary Protected Status that fall into none of the eligible categories listed in section 1621(a)? Calvo-Friedman’s reading solves this problem by reading section 1621(a)

this list, the federal statute bars states from offering a wide variety of benefits, including grants, contracts, loans, professional and commercial licenses, retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, and unemployment benefits.<sup>41</sup> But there is an exception: states may provide benefits on this list to otherwise ineligible noncitizens if they do so by the enactment of a state law.<sup>42</sup> In other words, states are preempted from offering benefits unless they do so in a way that satisfies Congress's criteria.

This may not feel very cooperative; Congress is essentially forcing states to regulate in a given way. But this is true in many instances of "cooperative" federalism: state regulatory schemes are wiped from the field unless they satisfy congressional standards. The Benefits Bar may be particularly objectionable because of the kind of conditions it imposes; in a previous article, I developed an argument that the Benefits Bar is unconstitutional because it unduly intrudes on the working of states' government processes.<sup>43</sup> In general, however, the idea of congressionally imposed conditions states must satisfy to avoid preemption is well-accepted.

Another reason why provisions like the Benefits Bar may not feel "cooperative" is that cooperative-federalism schemes are typically designed to encourage states to participate in the schemes. The purpose of offering federal matching funds in the Medicaid program, for example, is to encourage states to participate. But the purpose of the Benefits Bar is more likely to discourage states from acting at all. The Benefits Bar is part of the Welfare Reform Act, which was built on the assumption that the United States would be better off if "aliens within the Nation's borders [did] not depend on public resources to meet their needs."<sup>44</sup> Its purpose is ex-

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to confer eligibility on all lawfully present people. As noted below in note 42, there is an alternative solution to the problem of why the statute appears to allow states to offer benefits to unlawfully present noncitizens but not lawfully present ones: the New York Court of Appeals held that despite its text, the statute "obviously" authorizes benefits for lawfully present noncitizens. *Aliessa v. Novello*, 96 N.Y.2d 418, 426 (2001).

41. 8 U.S.C. § 1621(c)(1) (2018).

42. *Id.* § 1621(d) (2018). The New York Court of Appeals held that the statute "obviously" authorizes benefits for lawfully present noncitizens. *Aliessa*, 96 N.Y.2d at 426. The court noted that "[s]ection 1621(d) refers to [s]tate authority to provide for eligibility of *illegal* aliens," but held that "the statute obviously authorizes the State to provide State Medicaid to PRUCOLs." *Id.* at 426 n.9. The term "PRUCOLs" here refers to people "permanently residing in the United States under color of law"—a term which the Court of Appeals had defined to include "aliens of whom the INS is aware, but has no plans to deport." *Id.* at 422 n.2. Because the plaintiffs in that case included "PRUCOLs," this portion of the opinion was holding, not dicta.

43. Ava Ayers, *Federalism and the Right to Decide Who Decides*, 63 VILL. L. REV. 567 (2018).

44. 8 U.S.C. § 1601(2)(A) (2018); see Michael Fix and Ron Haskins, *Welfare Benefits for Non-Citizens*, BROOKINGS INST. (Feb. 2, 2002), <https://www.brookings.edu/research/welfare-benefits-for-non-citizens/> [https://perma.cc/6HMP-

pressed in the title of the relevant chapter of the United States Code: “Restricting Welfare and Public Benefits for Aliens.”<sup>45</sup>

Even though the Benefits Bar aims at state inaction rather than state action, it is still “cooperative” in the sense that it aims to elicit federal-state cooperation in the pursuit of a common policy goal. In this case, the goal is to deny public benefits to noncitizens, and thereby to treat them differently from citizens.

### B. *The Forms of Congressional Support for Discrimination*

Now that we’ve reviewed the tools Congress uses to create statutes that support state discrimination, we can look at the forms those statutes take. I’ll cover three: giving states discretion; giving states conditional discretion; and prescribing the judicial standard of review.

#### 1. *Giving States Discretion*

Some federal laws say only that states *may* discriminate against noncitizens in the provision of certain benefits. 8 U.S.C. § 1624 says that states are “authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance.”<sup>46</sup> Using similar language, 8 U.S.C. § 1622 says that “a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien.” (The phrase “qualified alien” is a defined term of art, encompassing several major categories of noncitizens, including legal permanent residents.<sup>47</sup>) Yet another provision, 8 U.S.C. § 1255a, creates a one-year window during which certain noncitizens can apply for lawful status,<sup>48</sup> then says that states “may . . . provide that the alien is not eligible” for certain state public benefits.<sup>49</sup>

Provisions governing Medicaid take a similar form.<sup>50</sup> Medicaid is “a cooperative endeavor in which the Federal Government provides financial

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M3RH] (“One of the more contentious issues in the 1996 welfare reform debate was whether the federal government should provide welfare benefits to non-citizens who are legal residents of the United States.”).

45. See 8 U.S.C. §§ 1601–1646 (2018).

46. 8 U.S.C. § 1624(a) (2018). The state denial of benefits must not be “more restrictive than the prohibitions, limitations, or restrictions imposed under comparable Federal programs.” *Id.* § 1624(b).

47. See 8 U.S.C. § 1641(b) (2018).

48. 8 U.S.C. § 1255a(h)(1)(A) (2018).

49. 8 U.S.C. § 1255a(h)(1)(B) (2018). The statute also disqualifies those who legalize under the provision from eligibility for federal benefits for five years. *Id.* § 1255a(h)(1)(A).

50. See generally 42 C.F.R. § 435.406 (2019) (noncitizen eligibility for Medicaid). For a convenient chart showing noncitizens’ eligibility for various federal and joint federal/state programs, see *Chart of Immigrant Eligibility for Federal Programs*, NCSL, <http://www.ncsl.org/research/immigration/immigrant-eligibility-for-federal-programs.aspx> [https://perma.cc/ST7J-YX63] (last visited Apr. 12, 2020).

assistance to participating States to aid them in furnishing health care to needy persons.”<sup>51</sup> The program, one scholar writes, “is fixed in the collective consciousness as a classic example of cooperative federalism.”<sup>52</sup> If states establish plans that satisfy federal requirements, including requirements about what health services must be offered, then the federal government will pay a percentage of the total amount spent.<sup>53</sup> Medicaid “does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable.”<sup>54</sup> States are authorized to determine the eligibility of “qualified aliens” for Medicaid.<sup>55</sup> (There is, however, a five-year bar on benefits from which states may not opt out.<sup>56</sup>) Likewise, states may choose whether to provide benefits under the Children’s Health Insurance Program (another jointly funded program<sup>57</sup>) to noncitizen children or pregnant women<sup>58</sup> (subject to the same five-year bar<sup>59</sup>). All of these statutes function by purporting to give states a choice about whether to discriminate.

Some provisions allow states no discretion so long as they participate in the federal program (and accept federal funds). For example, states receive federal support for unemployment-insurance programs as long as

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51. *Harris v. McRae*, 448 U.S. 297, 308 (1980); *see* 42 U.S.C. § 1396-1 (2018) (appropriating funds for “making payments to States which have submitted . . . State plans for medical assistance”).

52. Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 434 (2011) (footnote omitted).

53. *Harris*, 448 U.S. at 308 (citing 42 U.S.C. § 1396b(a)(1) (2018)).

54. *Id.* at 309.

55. 8 U.S.C. § 1612(b)(1) allows states to determine qualified aliens’ eligibility for Medicaid, “except as provided in [8 U.S.C. § 1613].” Section 1613, in turn, bars qualified aliens from receiving Medicaid or any other “Federal means-tested public benefit” for five years after entering one of the “qualified alien” statuses. *Id.* § 1613(a). There are multiple exceptions to both of these rules, but they’re not relevant here.

56. 8 U.S.C. § 1613(a) (2018).

57. 42 U.S.C. §§ 1397aa–1397mm (2018); *see State Children’s Health Insurance Program*, BENEFITS.GOV, <https://www.benefits.gov/benefit/607> [<https://perma.cc/ZC8A-QTRL>] (last visited Feb. 10, 2019); Alison Mitchell, *Federal Financing for the State Children’s Health Insurance Program (CHIP)*, CONG. RES. SERV. (May 23, 2018), <https://fas.org/sgp/crs/misc/R43949.pdf> [<https://perma.cc/LG6W-YLE4>]; *see also* State Children’s Health Insurance Program; Eligibility for Prenatal Care and Other Health Services for Unborn Children, 67 Fed. Reg. 61,956, 61,956 (Oct. 2, 2002) (“Benefits under SCHIP are jointly financed by the Federal and State governments and are administered by the States. Within broad Federal guidelines, each State determines the design of its program, eligibility groups, benefit packages, payment levels for coverage, and administrative and operating procedures.”).

58. 42 U.S.C. §§ 1396b(v)(4)(A), 1397aa(a) (2018). *See* Fatma Marouf, *Alienage Classifications and the Denial of Health Care to Dreamers*, 93 WASH. U. L. REV. 1271, 1281 (2016) (“The Children’s Health Insurance Program Reauthorization Act of 2009 (‘CHIPRA’) gives states the option of providing Medicaid or CHIP to children and/or pregnant women who are ‘lawfully residing’ in the United States and otherwise meet the criteria for these benefits.” (citing 42 U.S.C. §§ 1396b(v)(4)(A) (2014), 1397aa(a) (2014))).

59. 8 U.S.C. § 1613(a) (2018).



they comply with requirements set by Congress.<sup>60</sup> One of those requirements is that states deny benefits to undocumented people.<sup>61</sup> This is not a grant of discretion in the same sense as the provisions discussed above; states that participate in the cooperative program don't have a choice about whether to deny benefits to undocumented people. They do, however, have a choice about whether to participate in the program at all. Their discretion is thus more limited; it can be exercised in favor of the undocumented only at a high cost. Nonetheless, it is still discretion, rather than an outright federal ban.

## 2. *Discretion with Conditions*

Some statutes, rather than giving states unconditioned discretion, say states *may* treat noncitizens equally *if* the states fulfill certain conditions. These conditions might be substantive: one statutory provision says that states can only offer post-secondary education benefits to unlawfully present people if the same benefits are available to citizens.<sup>62</sup> Or they might be procedural: another provision says that states can offer benefits to unlawfully present people only if the state enacts a statute after 1996 explicitly offering the benefit.<sup>63</sup> In each case, Congress purports to give the states discretion while limiting the conditions under which they will be permitted to exercise that discretion.

## 3. *Prescribing the Standard of Review*

Finally, one provision of the Welfare Reform Act attempts to dictate to courts the standard of review that should apply if states discriminate against noncitizens; it also attempts to dictate the outcome of review under that standard.<sup>64</sup> According to this provision, if a state chooses to mirror the federal eligibility scheme (that is, to give noncitizens state public benefits comparable to the equivalent federal public benefits) then that state "shall be considered to have chosen the least restrictive means availa-

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60. See 26 U.S.C. § 3304(a) (2018); 42 U.S.C. § 503(a) (2018); see also *Esparza v. Valdez*, 862 F.2d 788, 789 (10th Cir. 1988); *Ibarra v. Tex. Emp't Comm'n*, 823 F.2d 873, 874–75 (5th Cir. 1987); *Brambila v. Bd. of Review, N.J. Dep't of Labor & Indus.*, 124 N.J. 425, 431 (1991).

61. 26 U.S.C. § 3304(a)(14)(A) (2018).

62. 8 U.S.C. § 1623(a) (2018). The statute provides:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

*Id.* (emphasis added).

63. 8 U.S.C. § 1621(d) (2018).

64. 8 U.S.C. § 1601(7) (2018).

ble for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.”<sup>65</sup>

Although for the most part I will defer until later in the Article any constitutional analysis of the statutes laid out in this section, it’s hard to resist noting how screamingly unconstitutional this provision is. *City of Boerne v. Flores*,<sup>66</sup> a decision handed down the year after the Welfare Reform Act took effect, held that Congress exceeds its powers when it attempts to prescribe a standard of review that would determine whether the Fourteenth Amendment has been violated, because Congress lacks the power “to decree the substance of the Fourteenth Amendment’s restrictions on the States.”<sup>67</sup> The language quoted above not only attempts to dictate the standard of review, but also the outcome; it is thus much less acceptable than what *City of Boerne* rejected.

The two major forms of discriminatory-cooperative federalism with which we should be concerned, then, are statutes that give states discretion and conditional discretion to discriminate. The rest of this Article will examine grounds on which such statutes might be challenged. As I explained above, cooperative-federalism schemes involve state and federal actions which can be challenged on separate grounds. So the next section of the Article begins with challenges to the federal role, and the last section considers challenges directed at states.

## II. CHALLENGING CONGRESS’S ROLE IN DISCRIMINATORY COOPERATIVE FEDERALISM

To analyze congressional support for state discrimination, we’ll begin with challenges to the congressional actions that form part of discriminatory cooperative-federalism schemes. Here, the question is whether Congress can lawfully act to support the state’s act of discrimination, not whether the states can lawfully act under whatever authority Congress confers.

### A. *The Uniformity Challenge*

The first challenge I’ll discuss is an argument specific to the immigration context: the argument that when Congress takes action on immigration, it must do so in a uniform national policy.

The Naturalization Clause gives Congress the power to “establish an *uniform* Rule of Naturalization.”<sup>68</sup> When Congress authorizes the states to make discretionary decisions about how to treat noncitizens, the results will generally not be uniform. Thus, any statute that authorizes such a patchwork is arguably not a “uniform rule.” And there is case law that

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65. *Id.*

66. 521 U.S. 507 (1997).

67. *Id.* at 519.

68. U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

supports the idea that Congress violates the uniform rule requirement when it gives states the power to make discretionary decisions.

In *Graham v. Richardson*,<sup>69</sup> the Supreme Court struck down a state law that denied welfare benefits to noncitizens (but not citizens) for two reasons: the state law violated the right to equal protection; and it was pre-empted.<sup>70</sup> After explaining those two holdings, the Court went on to reject the state's argument that its law was authorized by a federal statute.<sup>71</sup>

The federal statute at issue in *Graham* involved federal grants that supported state welfare benefits. The statute essentially said if states wanted to receive the federal grants, they couldn't impose "[a]ny citizenship requirement which excludes any citizen of the United States."<sup>72</sup> By requiring the inclusion of citizens, did the statute implicitly authorize the exclusion of noncitizens? The Court declined to read this statute to affirmatively authorize state discrimination. It noted the principle that "statutes should be construed whenever possible so as to uphold their constitutionality."<sup>73</sup> And it said:

Congress does not have the power to authorize the individual States to violate the Equal Protection Clause . . . . Under Art. I, § 8, cl. 4, of the Constitution, Congress' power is to "establish a uniform Rule of Naturalization." A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.<sup>74</sup>

To avoid the constitutional uniformity problem, *Graham* interpreted the federal statute as not authorizing the discriminatory state law.<sup>75</sup>

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69. 403 U.S. 365 (1971).

70. *Id.* at 376 ("[W]e hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause."); *id.* at 380 ("State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible.").

71. *Id.* at 380.

72. *Id.* (quoting 42 U.S.C. § 1352(b) (1971) (current version at § 1352(b) (2018))). The federal statute said that the federal agency "shall not approve any [state] plan which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan . . . [a]ny citizenship requirement which excludes any citizen of the United States." *Id.* The provision still contains the same language.

73. *Id.* at 382–83 (quoting *United States v. Vuitch*, 402 U.S. 62, 70 (1971)).

74. *Id.* at 382 (citation omitted).

75. *Id.* at 383.

A decade later, the Court again referenced the uniformity requirement in *Plyler v. Doe*,<sup>76</sup> which found that a Texas statute violated equal protection by denying an education to unlawfully present children.<sup>77</sup> In doing so, the Court rejected (in a footnote) the argument that unlawfully present noncitizens are a “suspect class.”<sup>78</sup> To this footnote it added language noting that states cannot create immigration laws or policy.<sup>79</sup> “But,” wrote the Court, “if the Federal Government has *by uniform rule* prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.”<sup>80</sup>

It isn’t clear what the Court meant by “follow the federal direction”; if the Court meant that Congress can give states the discretion to adopt differing standards, then its language seems to contradict *Graham*. If *Plyler* merely meant to observe that states can follow Congress’s instructions (in other words, comply with statutes that use outright preemption to dictate states’ behavior), then this dictum is uncontroversial.

In 2001, the New York Court of Appeals applied *Graham* to hold that the Welfare Reform Act violates the uniformity requirement. The state law at issue in that case, *Aliessa v. Novello*,<sup>81</sup> limited state-funded Medicaid benefits for certain noncitizens.<sup>82</sup>

The New York court began by framing the question as a challenge to the federal statute. “[T]he issue,” according to the court, was “not whether the State has followed [Congress’s] authorization,” but “whether title IV [of the Welfare Reform Act] can constitutionally authorize New York to determine for itself the extent to which it will discriminate against legal aliens.”<sup>83</sup> In other words, the court resolved a challenge to the constitutionality of the federal statute before addressing any challenges to the constitutionality of the state law.

*Aliessa* invoked “*Graham*’s requirement for uniformity in immigration policy,” holding that “Title IV does not impose a *uniform* immigration rule for States to follow.”<sup>84</sup> Because the Welfare Reform Act allows states a choice about whether to afford benefits, “the States are free to discriminate in either direction—producing not uniformity, but potentially wide variation based on localized or idiosyncratic concepts of largesse, econom-

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76. 457 U.S. 202 (1982).

77. *Id.*

78. *Id.* at 219 n.19.

79. *Id.*

80. *Id.* (emphasis added) (citing *DeCanas v. Bica*, 424 U.S. 351 (1976)).

81. 96 N.Y.2d 418 (2001).

82. *Id.* at 427 (discussing N.Y. SOC. SERVS. LAW § 122).

83. *Id.* at 433 (“Plaintiffs contend, however, that the issue is not whether the State has followed the authorization. Rather, it is whether [the Welfare Reform Act] can constitutionally authorize New York to determine for itself the extent to which it will discriminate against legal aliens for State Medicaid eligibility. Plaintiffs argue that it cannot, and we agree.”).

84. *Id.* at 434–35.

ics and politics.”<sup>85</sup> After concluding that the federal statute was unconstitutional, *Aliessa* applied strict scrutiny to the state law, just as it would have applied strict scrutiny to any discriminatory state law in the absence of federal authorization.<sup>86</sup>

The relationship between equal protection and uniformity can be perplexing, but the way *Aliessa* handled it makes sense. Before deciding whether a federal statute has any effect on a claim that a state law violates the right to equal protection, a court should first hear any challenges that directly impugn the constitutionality of the federal statute. If the federal statute is unconstitutional, the court can treat the case as if no federal statute existed, meaning that the state is in the same position it would have been in without any federal statute: subject to strict scrutiny.<sup>87</sup>

The Ninth and Tenth Circuits, however, have rejected uniformity challenges to provisions of the Welfare Reform Act.<sup>88</sup> These courts, as well as scholars, have made four major arguments against the uniformity challenge: a historical argument about the purpose of the Uniformity Clause; an argument that granting discretion is a uniform policy; an argument that patchworks are inevitable; and an argument that the uniformity requirement applies to naturalization, but not to immigration more broadly.

The first response to the uniformity challenge is a historical and purposive one. The Tenth Circuit’s decision in *Soskin v. Reinertson*<sup>89</sup> argues that the purpose of the Uniformity Clause was merely to avoid a problem that arose under the Articles of Confederation, in which one state, having laxer citizenship requirements than its neighbor, could grant citizenship, which the neighboring state would then be required to honor.<sup>90</sup> In other

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85. *Id.* at 435. The Pennsylvania Attorney General, in a 1996 opinion, reached the same conclusion: that the Welfare Reform Act violates the uniformity requirement, as *Graham* construed it, because the act “allows each individual state to determine the eligibility of its resident aliens for state welfare benefits.” Pa. Att’y Gen. Op. No. 96-1, 1996 Pa. AG LEXIS 2, \*21–22 (finding unconstitutional section 412 of the Welfare Reform Act, 8 U.S.C. § 1622, because “[r]ather than prescribing a ‘uniform’ rule, [it] allows each individual state to determine the eligibility of its resident aliens for state welfare benefits”).

86. *Id.* at 435–36.

87. Condon has a different understanding of the uniformity doctrine; she writes that it:

[I]s not really a delegation doctrine, but a supremacy one. That is, when courts accept that Congress has created a uniform immigration rule for states to follow, they are really concluding that Congress has set immigration policy, which the Supremacy Clause requires states to follow; they are not ruling that Congress has shared (or devolved) immigration rulemaking power so that the states may set their own immigration law.

Condon, *Equal Protection for Immigrants*, *supra* note 2, at 108.

88. See *Korab v. Fink*, 797 F.3d 572, 582 (9th Cir. 2014); *Soskin v. Reinertson*, 353 F.3d 1242, 1256–57 (10th Cir. 2004).

89. 353 F.3d 1242 (10th Cir. 2004).

90. *Id.* at 1257; see also *Korab*, 797 at 580–81; cf. *Immigration Federalism*, *supra* note 2, at 2259 (“The historical evidence thus supports a narrow reading of the

words, a state might be theoretically free to deny citizenship to a certain individual, but in practice the state would be required to honor a neighboring state's grant of citizenship, which would effectively nullify the state's supposed discretion and allow the state with the most generous citizenship standards to set national citizenship policy.

It is apparently true that the purpose of the Uniformity Clause was to ensure that states did not adopt divergent naturalization standards.<sup>91</sup> But why should that mean, as the Tenth Circuit seems to think, that the Uniformity Clause allows divergent standards for public benefits? To be sure, if we define the problem the clause addresses at a low level of generality, we might call it divergent standards on naturalization (i.e., citizenship).<sup>92</sup> But we might just as easily say, at a higher level of generality, that the problem the Framers saw was divergent standards on the status of noncitizens. In other words, we might say that the problem was states adopting immigration-related policies that affected other states. And then again, at an even higher level of generality, we could say that the problem the Framers encountered was the very fact of state regulation of immigration.

A broader interpretation of the Framers' concerns (that is, one that expresses the concern at a higher level of generality, as a concern about divergent state regulations of immigration) seems more faithful to Supreme Court precedent. As the Supreme Court recently noted in a background discussion of immigration preemption, "It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States."<sup>93</sup> Why, then, should we read the uniformity rule to address a narrow problem, rather than the broader problem of subjecting foreign nationals to a patchwork of regulation? *Soskin* offers no good reason to limit the Uniformity Clause to a narrow, specific context.

A second response to the uniformity challenge is to argue that when Congress grants states discretion, it *does* create a uniform national policy. This is what the Ninth Circuit held in *Korab v. Fink*.<sup>94</sup> "[A]lthough the 'particulars' are different in different states, the basic operation of the Welfare Reform Act is uniform throughout the United States."<sup>95</sup> The idea is that states everywhere have discretion; they are uniformly given discretion; thus, although the results may be different, the rule is uniform. (We

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uniformity requirement, to apply only when one state's decision to benefit or injure an alien would compel another state to do the same.").

91. See Michael Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1009–12 (1976).

92. On levels of generality, see, e.g., Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1085 (1981); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1065 (1990).

93. *Arizona v. United States*, 567 U.S. 387, 395 (2012).

94. *Korab*, 797 F.3d at 581–82.

95. *Id.* at 581 (citing *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)).

might say, analogously, that when I told each of my two daughters that they could spend twenty dollars at the fair on whatever they liked, I prescribed a uniform purchasing rule, even though one kid left with a stuffed panda and the other with five pounds of Sour Patch Kids.)

But if a grant of discretion is inherently uniform, what would a non-uniform policy look like?<sup>96</sup> *Korab* doesn't specify. One example, perhaps, would be a federal statute that said, "No noncitizen in states west of the Mississippi River shall receive Medicaid benefits." But no court of which I'm aware has argued that this is what the clause means, or that the Framers saw a need for this kind of rule.

And the argument that grants of discretion are inherently uniform conflicts with the historical-purpose argument made in *Soskin*. If the problem is divergent state policies, then the focus should be on the outcome, not the abstract uniformity of the federal statute. It seems unlikely that the Framers feared Congress would single out specific states for differential conferral of power over immigration.

A third response to the uniformity challenge is that it proves too much, because it is inevitable that states will create a patchwork of different rules governing the treatment of noncitizens. And this is clearly true; Howard Chang (writing about preemption, not uniformity) has illustrated how, given the diversity of ways in which states exercise their police powers, it is unrealistic to think that we could avoid a patchwork of state regulation affecting immigration.<sup>97</sup> For one thing, state criminal law and marriage-eligibility laws can have an important (and hardly uniform) impact on immigration status, even if the states never directly regulate immigration.<sup>98</sup> For another thing, Supreme Court precedent establishes that states can pass laws that directly affect noncitizens, as long as they comply with the preemption standards set forth in cases like *De Canas v. Bica*.<sup>99</sup>

This argument, however, leaves us nowhere. It's true that no "uniform rule" will ever govern the treatment of noncitizens in the wide variety of areas in which states regulate. But we still need to find some meaning to impart to the term "uniform" in the Constitution, and knowing that patchworks are inevitable doesn't help.

A fourth response to the uniformity challenge is to argue that the uniformity requirement applies only to naturalization, not to questions of public benefits or other issues involving the treatment of noncitizens during their stay in the United States. The Constitution refers to a "uniform rule of *naturalization*," not to uniformity more generally. The federal power to regulate immigration stems not just from this provision but from several others.<sup>100</sup> If federal power to regulate public benefits for nonci-

96. Hertz, *supra* note 91, at 1012–13. As Hertz notes, the term "uniform" must be construed to add some meaning to the clause. *Id.*

97. Chang, *supra* note 2, at 360–61.

98. *Id.*

99. 424 U.S. 351, 360–61 (1976); see Chang, *supra* note 2, at 361.

100. See *infra* notes 190–192 and accompanying text.

tizens arises not from the Naturalization Clause but from other sources, then arguably the concept of a “uniform rule” should not be applied to exercises of power that are based on those other sources.

In *Toll v. Moreno*,<sup>101</sup> the Court said that “Federal authority to regulate the status of aliens derives from various sources, including the Federal Government’s power ‘[t]o establish [a] uniform Rule of Naturalization,’ its power ‘[t]o regulate Commerce with foreign Nations’, and its broad authority over foreign affairs.”<sup>102</sup> Earlier, *Chae Chan Ping v. United States*<sup>103</sup> found that the immigration power is “an incident of sovereignty.”<sup>104</sup> These other sources do not support a requirement of uniformity, or so the argument goes.<sup>105</sup>

It is not clear, however, that the immigration power can be disaggregated in a way that limits the uniformity requirement to naturalization. Even if the federal immigration power could be broken apart into separate components, which one would give rise to the power to regulate state benefits? None of the other sources of the power are more obvious candidates for an implied source of power to regulate public benefits. State public benefits in particular are not a form of commerce with other nations, or foreign affairs; nor are they an incident of the United States’ international sovereignty. There is therefore no reasonable way to trace the immigration power to one of those sources more than the Naturalization Clause.

Moreover, the Supreme Court’s language in *Graham*, quoted above, would have been unnecessary if the uniformity requirement were irrelevant. *Graham* was specifically addressing a federal statute that arguably authorized differential treatment under state public-benefits laws; it had nothing to do with naturalization. Thus, it is hard to make a case that the uniformity requirement doesn’t apply to matters other than naturalization.

The uniformity challenge, then, is at least a viable one. If successful, it (technically speaking) invalidates only the federal component of the discriminatory cooperative-federalism scheme; the state’s component remains to be challenged. But a challenge to the state’s component will easily prevail in the absence of a valid federal action, because strict scrutiny is the general rule for challenges to discriminatory state laws. And even if the uniformity challenge doesn’t succeed, there are other ways to

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101. 458 U.S. 1 (1982).

102. *Id.* at 10 (citation omitted) (quoting U.S. CONST., art. I, § 8, cl. 4; *id.* cl. 3) (citing *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936)).

103. 130 U.S. 581 (1889).

104. *Id.* at 609; see also *Harisiades*, 342 U.S. at 588–89 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”).

105. See *Immigration Federalism*, *supra* note 2, at 2260–61.



challenge the federal component of discriminatory cooperative federalism.

B. *The Argument that This Isn't Immigration Law*

There is a more radical challenge to congressional support for discrimination against noncitizens. It is a challenge that seems unlikely to prevail in the Supreme Court now that Justice Kavanaugh has joined it and apparently stabilized a five-justice conservative majority, but it is a challenge that is nonetheless worth exploring. This challenge attempts to cabin the plenary power, arguing that congressional regulation of public benefits is not really immigration law at all, and thus deserves none of the deference afforded to matters like exclusion and removal from the United States.

As discussed above, the plenary power is as well-established in Supreme Court precedent as it is heavily criticized by scholars.<sup>106</sup> While many of the criticisms are directed at the core of the doctrine, others argue that it has overgrown its boundaries.<sup>107</sup> Specifically, scholars like Matthew Lindsay argue that courts should stop lumping together—and giving the same degree of deference to—regulation of border-crossing (i.e., admission and removal) and regulation of noncitizens during their stay in the United States.<sup>108</sup> In this context, a distinction is made between “immigration law” and “alienage law.” “Immigration law” refers to regulation of issues like who can be admitted to the United States and on what conditions they can be admitted, as well as who should be deported; while “alienage law” is applied to the treatment of noncitizens.<sup>109</sup> Alienage law includes rules governing noncitizens’ access to education, public benefits, government employment, and their right to vote.<sup>110</sup>

The Supreme Court has acknowledged the distinction. In the pre-emption case *De Canas v. Bica*, it said, “[S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal

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106. See *supra* note 16 (collecting cases).

107. See Abrams, *supra* note 18, at 619.

108. Matthew Lindsay, *Disaggregating “Immigration Law,”* 68 FLA. L. REV. 179 (2016); see Motomura, *Plenary Power*, *supra* note 14, at 547 (“As I use the term, ‘immigration law’ refers to the body of law governing the admission and expulsion of aliens. It should be distinguished from the more general law of aliens’ rights and obligations, which includes, for example, their tax status, military obligations, and eligibility for government benefits and certain types of employment.” (footnotes omitted)).

109. See Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 360–61 (2008).

110. Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 202 (1994) [hereinafter Motomura, *Immigration and Alienage*].

entrant may remain.”<sup>111</sup> *De Canas* held that a state law dealing with the employment of undocumented people was not necessarily preempted by federal power.<sup>112</sup> But in its preemption cases, the Court often finds that alienage regulations are in effect regulations of immigration, in that state laws affecting noncitizens make it difficult or impossible for those noncitizens to freely immigrate to the states.<sup>113</sup>

There is undoubtedly a practical overlap between the categories. As Clare Huntington notes, for example, “alienage laws barring non-citizens from certain public benefits likely affect immigration by discouraging some non-citizens from coming to the United States and encouraging others to leave.”<sup>114</sup> Hiroshi Motomura has even written that a distinction between immigration law and alienage law “would be more formal than real.”<sup>115</sup>

While there is certainly overlap between immigration law and alienage law, the overlap is mainly in the effects of the laws, not in the nature of the laws themselves. Alienage law affects immigration, and vice versa. But it is not terribly difficult to distinguish between immigration and alienage laws, even though their effects may all “belong to the broader enterprise of determining who belongs to American society as full members or as something less.”<sup>116</sup>

Scholars have also observed that many of the laws admitting noncitizens into the country also impose requirements about what they can do while they’re here: people admitted on student visas are restricted from most kinds of work, for example.<sup>117</sup> As Wishnie asks, “If employment without INS authorization renders an immigrant deportable and is therefore ‘immigration law,’ why is a direct prohibition on employment of certain immigrants merely ‘alienage law?’”<sup>118</sup> The answer may not be satisfying, but it isn’t difficult to see: one leads to removability, and the other doesn’t.

111. *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

112. *Id.* The Court remanded for an inquiry into obstacle preemption. *Id.* at 364–65.

113. See *Abrams*, *supra* note 18, at 621 (“[I]n most of the preemption cases challenging state alienage statutes that the Supreme Court has heard, the Court has applied an analysis that folds in the national sovereignty concerns from the structural preemption and plenary power cases, by construing the specific alienage regulation as regulations of immigration in disguise.”).

114. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798 (2008).

115. Motomura, *Immigration and Alienage*, *supra* note 108, at 203; see also Lindsay, *supra* note 108, at 194–96.

116. Motomura, *Immigration and Alienage*, *supra* note 108. Concepts of belonging no doubt play a part in both regimes, but immigration laws define who gets to be physically present in America; alienage laws define the extent to which they are part of it. Adam Cox also notes that the plenary power is not monolithic even in the immigration context; exclusion gets less deference than removal. Adam Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 380 & n.20 (2004).

117. Wishnie, *supra* note 2, at 525.

118. *Id.* (footnotes omitted).

The distinction is perhaps more problematic in the context of preemption of state laws that deal with the enforcement of immigration law. In general, preemption doctrine says that although states cannot regulate immigration at all, state regulations of alienage are subject only to a requirement that the states not add burdens to a status beyond those contemplated by Congress.<sup>119</sup> Again, this is a case where the law already recognizes the distinction between immigration and alienage. As Lindsay notes, however, state enforcement laws like the one in *Arizona v. United States*<sup>120</sup> are often explicitly designed to deter migration.<sup>121</sup> Indeed, the Court acknowledged as much.<sup>122</sup> These laws aim to lend state assistance to removing undocumented people from their territory; it is thus difficult place them on the immigration/alienage continuum.<sup>123</sup> And the Court has generally not used the language of plenary power in the enforcement context, so the applicability of these questions to law-enforcement cases remains somewhat mysterious.

Nonetheless, the distinction between immigration and alienage laws is clear enough at its core for us to consider the argument that the plenary-power doctrine makes far less sense when we are discussing alienage laws than immigration laws.

Bosniak points out that “some commentators have characterized federal discrimination in the allocation of Medicare benefits as a matter implicating Congress’s plenary power to regulate the national borders—despite the lack of any apparent relationship between the provision of government medical benefits and the admission, expulsion, and naturalization of aliens.”<sup>124</sup> Others, as she points out, have rejected the conflation of immigration and alienage law. Gerald Rosberg wrote, “The provision restricting alien participation in the Medicare insurance program was not in any obvious way concerned with immigration. It did not operate as an express condition on the right of resident aliens to enter the United States

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119. See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); *id.* at 355 (“[S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”); see also *Toll v. Moreno*, 458 U.S. 1, 14 (1982) (holding that a state’s denying “in-state” status and resulting tuition discount to G-4 aliens, solely on account of their immigration status, “amounts to an ancillary burden not contemplated by Congress in admitting these aliens to the United States” (internal quotation marks omitted)).

120. 567 U.S. 387 (2012).

121. Lindsay, *supra* note 108, at 199–200 (citing *Arizona v. United States*, 567 U.S. 387 (2012)).

122. In *Arizona*, the Court noted that the Arizona law’s stated purpose was to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” *Id.* (quoting note following ARIZ. REV. STAT. ANN. § 11-1051 (West 2012)).

123. See Lindsay, *supra* note 108, at 199–201.

124. Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1066 (1994).

or to make this country their home.”<sup>125</sup> This matters, Rosberg wrote, because the reasons for deference do not apply: “The restrictions are simply not a part of the congressional judgment about the classes of aliens that should be admitted to the United States.”<sup>126</sup> Expanding on this idea, Alex Aleinikoff criticizes the idea “that every federal regulation based on alienage is necessarily sustainable as an exercise of the immigration power.”<sup>127</sup> He explains that “some statutes burdening aliens are based on considerations other than a policy judgment regarding the number and classes of aliens who may enter or remain in the United States.”<sup>128</sup>

There is no reason to accept that all regulations of alienage have implications for foreign affairs.<sup>129</sup> Lindsay argues that the Court’s jurisprudence has inappropriately assumed that all regulations of immigration or alienage are justified by the federal government’s interest in maintaining control over the nation’s foreign affairs.<sup>130</sup> The plenary-power analysis allows the government to assert its foreign-affairs interest in general, as a categorical matter, without tying it to the specific regulation at issue.<sup>131</sup> But many regulations of alienage are unlikely to affect any foreign-affairs interest. For example, it is possible that the movement of people across international borders will be affected by whether noncitizens with temporary visas are eligible for professional licenses: eligibility for a license might give some noncitizens a marginal incentive to come to the United States, and the governments of their countries of origin might well care about that. But would it matter to foreign governments whether the same professional license is differentially available to United States citizens, or whether noncitizen licensees are subject to a different probationary period during the early years of licensure? Not all state regulations of noncitizens make noticeable ripples on the international scene. But the plenary-power doctrine simply assumes that all such issues affect foreign relations, with no inquiry permitted.

All of these arguments add up to the idea that plenary-power deference should not apply to federal statutes that regulate the treatment of noncitizens in the United States, including the public benefits they are eligible to receive. This is not yet a challenge to the federal statutes that operationalize discriminatory cooperative federalism; it is, rather, a challenge to the level of scrutiny that traditionally protects such statutes. If the challenge is correct, and strict scrutiny does not apply, then the govern-

125. Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275 (1977).

126. *Id.* at 336.

127. T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862, 869 (1989).

128. *Id.* at 869–70.

129. See Condon, *Equal Protection for Immigrants*, *supra* note 2, at 100 (noting criticism of *Mathews* “for accepting that Congress’s alienage-based restriction on benefits challenged in the case actually constituted an immigration regulation”).

130. Lindsay, *supra* note 108, at 241.

131. *Id.*

ment will have to defend those statutes by offering a meaningful justification for them. If there is no plenary power, there is no plenary power to share with the states.

Prevailing on this argument, of course, would require overturning *Mathews v. Diaz*, or at least finding a way to creatively distinguish it into near-oblivion.<sup>132</sup> As unlikely as it may seem that the Supreme Court would look favorably on such a project, there are some lines of argument that are worth considering.

We might begin the effort to cabin plenary power by pointing out that Supreme Court precedents already recognize that in the area of alienage law, federal power is less than exclusive. If a power is less than exclusive, then perhaps it is also less than plenary.

In alienage law, but not immigration law, states are allowed to exercise their police power. The scope of federal preemption is near-absolute when it comes to the regulation of immigration; states cannot grant or deny visas or order people deported. But they can grant or deny welfare benefits to noncitizens, and generally regulate the treatment of noncitizens so long as they do not unduly burden the noncitizens' status as such.<sup>133</sup> The fact that federal authority is not preemptive to the same extent in the realm of alienage suggests an argument that the plenary power, likewise, ought not to be construed as equally powerful in both realms.

In *De Canas*, the Court affirmed that "[p]ower to regulate immigration is unquestionably exclusively a federal power."<sup>134</sup> Then, however, it said, "But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted by this constitutional power, whether latent or exercised."<sup>135</sup> The Court suggested that only some laws affecting immigrants were the subject of exclusive power. "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."<sup>136</sup>

*De Canas* found that Congress had not occupied the field of regulation of noncitizens; thus, in the absence of a specific congressional enactment or an obstacle to Congress's objectives, the state law at issue would not be preempted.<sup>137</sup> The Court distinguished between immigration and alienage regulation:

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132. Wishnie, *supra* note 2, at 524; see *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." (footnote omitted)).

133. See *Toll v. Moreno*, 458 U.S. 1, 12–13 (1982).

134. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976).

135. *Id.* at 355.

136. *Id.*

137. *Id.* at 363.

Indeed, there would have been no need, in cases such as *Graham*, *Takahashi*, or *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941), even to discuss the relevant congressional enactments in finding pre-emption of state regulation if all state regulation of aliens was ipso facto regulation of immigration, for the existence vel non of federal regulation is wholly irrelevant if the Constitution of its own force requires pre-emption of such state regulation.<sup>138</sup>

*De Canas* thus holds that the strong federal immigration power applies only to the decision whether to admit someone and the terms on which they will be permitted to stay, not questions of how the law treats noncitizens during their time in the United States. If the strong federal power does not apply to alienage regulations, neither should strong judicial deference.

The decision in *De Canas* was issued in 1976, a few months before the decision in *Mathews*.<sup>139</sup> More recent cases suggest a different way in which the borders of plenary power may be eroding. Some scholars saw the 2001 cases of *Zavydas v. Davis*<sup>140</sup> and *Nguyen v. INS*,<sup>141</sup> as a partial retreat from the plenary-power doctrine.<sup>142</sup> *Zavydas* puts limits on the detention of noncitizens when there is no longer a realistic prospect of removing them. In a sense, it sits at the intersection of immigration law and alienage law. The noncitizens in question are still in the immigration system, but as their detention becomes less and less related to immigration it merits less deference. The recent case of *Sessions v. Morales-Santana*<sup>143</sup> points in the same direction, applying intermediate scrutiny to a gender-based classification in the law of citizenship.<sup>144</sup> Again, the rules at issue related to immigration, but they also implicated concerns (like gender discrimination) that had little to do with immigration, and lesser deference was afforded.

Without doubt, the plenary power doctrine lives on.<sup>145</sup> But anyone who seeks to challenge discriminatory cooperative federalism should at least consider arguing that it has less force in the context of alienage laws.

### C. *The Anti-Delegation Challenge*

So far, we've looked at two challenges to federal statutes that attempt to support state discrimination. A third challenge could be pursued even if courts held that Congress has the power to give states discretion (with-

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138. *Id.* at 355.

139. *De Canas* issued on February 25, 1976, and *Diaz* issued on June 1.

140. 533 U.S. 688 (2001).

141. 533 U.S. 53 (2001).

142. See Spiro, *supra* note 16.

143. 137 S. Ct. 1678.

144. *Id.* at 1698.

145. See Rosenbaum, *supra* note 16, at 152 ("In spite of some signs of a departure from the plenary power doctrine, the Court still gives significant deference to Congress in the area of immigration law." (footnote omitted)).

out violating the uniformity requirement), and even assuming that Congress's own actions are entitled to judicial deference (under the plenary-power theory). This third challenge argues that although Congress itself has power, or deserves deference, it nonetheless can't share its power, or its entitlement to deference, with the states.

As we know, Congress's power over matters related to immigration is "largely immune to judicial inquiry or interference."<sup>146</sup> Congress can treat citizens and noncitizens differently without violating the right to equal protection, provided only that the differential treatment is not "wholly irrational."<sup>147</sup> In explaining why Congress enjoys this immunity from scrutiny, the Supreme Court has analogized immigration matters to political questions as to which Congress's reasoning is wholly unreviewable.<sup>148</sup> One way in which Congress might attempt to support state discrimination, then, is to try to share with the states, or delegate to them, its broad power to discriminate.<sup>149</sup> To understand the third challenge to the federal role in discriminatory cooperative federalism, we'll first have to understand why a court might find that Congress's power to discriminate, or its entitlement to deference, could be delegated to the states.

### 1. *Arguments for Delegability*

Some scholars and courts have argued that under the right circumstances, Congress has the power to authorize, or validate, state actions that would otherwise be unconstitutional.

The leading judicial statement that is cited in defense of this proposition is from *Plyler v. Doe*, in which the Court said, "if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction."<sup>150</sup> This is dicta; *Plyler* struck down a state

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146. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) ("[A]ny policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune to judicial inquiry or interference.").

147. *Mathews v. Diaz*, 426 U.S. 67, 83; see *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001). For criticism of this doctrine, see, e.g., Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Motomura, *Immigration and Alienage*, *supra* note 110, at 549.

148. *Mathews*, 426 U.S. at 81–82.

149. Carrasco calls this "inverse preemption." Carrasco, *supra* note 2, at 618. "Under such a theory, a state would be empowered to violate the Equal Protection Clause because Congress has authorized it to do so." *Id.*

150. *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (citing *DeCanas v. Bica*, 424 U.S. 351 (1976)). Carrasco tries to make this go away:

As the Court's citation to *DeCanas v. Bica* suggests, however, the dictum must be strictly limited to state regulation of undocumented aliens in contexts in which the states have a legitimate regulatory interest. Because *DeCanas*, like *Plyler*, involved a classification of undocumented aliens, and

program. And, as discussed above, it's unclear what the Court had in mind when it said states can "follow the federal direction."<sup>151</sup> It might merely mean that states can follow congressional "directions" in the sense of commands. If so, the proposition is uncontroversial, but irrelevant to federal statutes that attempt to give states discretion. Moreover, other judicial statements (discussed below) push strongly in the opposite direction.<sup>152</sup>

Nonetheless, some scholars have developed the case for delegability in significant detail. For example, William Cohen argued in 1983 that "Congress should be able to approve unconstitutional policy choices in state laws when Congress is not constitutionally prohibited from directly adopting the same policy itself."<sup>153</sup> Cohen didn't think Congress could validate all unconstitutional state laws; the power existed, he said, only when the reason for unconstitutionality stemmed from the division of power between Congress and the states.<sup>154</sup> What he meant by this, apparently, was simply that Congress can't authorize anything it can't do itself. For example, states can't tax transactions beyond their borders, but Congress can tax transactions in any state; therefore, Cohen says, the congressional power to validate applies.<sup>155</sup> But gender discrimination, he noted, is equally impermissible when perpetrated by Congress or the states, so Congress cannot validate states' gender discrimination.<sup>156</sup>

Cohen's analysis culminated in what he called a "disturbing conclusion": "Because earlier Supreme Court cases suggest that federal power to deny benefits to aliens has no limits, it follows that congressional power to validate the most 'invidious' state alienage classifications is also limitless."<sup>157</sup> This follows necessarily from his principle that Congress can validate anything it can itself do: since Congress can treat noncitizens differently, it can authorize states to do the same.

But Cohen's principle is far from obvious. Some congressional powers can be delegated, but others can't.<sup>158</sup> Why should the power to treat noncitizens differently be delegable? Cohen thought that any other con-

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because *DeCanas* was not decided on the basis of equal protection, any reliance on this case to support the validity of state action under IRCA is misplaced.

Carrasco, *supra* note 2, at 622–23.

151. See *supra*, paragraph following note 80.

152. See *infra*, Section II.C.2.a, notes 164–189 and accompanying text.

153. Cohen, *supra* note 2, at 388.

154. *Id.* at 388.

155. *Id.* at 401.

156. *Id.* at 400–01.

157. *Id.* at 420–21 (footnote omitted).

158. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (holding that Congress can't delegate Article III jurisdiction to non-Article III courts); see also Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000) ("Reports of the death of the nondelegation doctrine have been greatly exaggerated.").



clusion “could produce bizarre results.”<sup>159</sup> “For example,” he wrote, “Congress might be able to make an alien’s application for state welfare benefits a basis for deportation but not be able to authorize the states to deny aliens those benefits in the first instance.”<sup>160</sup> He didn’t specify why that result is bizarre. Congress may have the power to deport someone for doing X, but it hardly follows that Congress can itself prohibit X. For example, a federal statute says that noncitizens can’t receive asylum if they have persecuted others in their country of origin.<sup>161</sup> Thus, people who, while abroad, persecuted others can be deported. But that doesn’t necessarily imply that Congress has the extraterritorial jurisdiction required to prohibit persecution abroad.<sup>162</sup> Likewise, Congress has provided that noncitizens become deportable if they get a divorce within two years after marrying for immigration-related reasons.<sup>163</sup> But that hardly means that Congress can prohibit the divorce. The same is true of conduct by states: the fact that Congress can deport a noncitizen for receiving something from a state does not mean that Congress can directly prohibit the state from giving it to the noncitizen. Cohen’s argument isn’t necessarily wrong; it just requires a further premise. Some powers are transferable, and others aren’t. What is needed is a test that will allow us to distinguish which are which. The opponents of delegability have done much more than Cohen to develop such a test.

## 2. *Arguments Against Delegability*

The arguments against the delegability of the federal power to discriminate are strong. Leading the charge against delegability in a 2001 article, Michael Wishnie argued that the federal power to discriminate against noncitizens can’t be delegated, because the immigration power in general is “exclusively national and incapable of devolution to the states.”<sup>164</sup> This is essentially the flip-side of the plenary-power doctrine: if the federal power over immigration is so sacred that courts can’t oversee it, then it should also be too sacred to share with the states.

The anti-delegability challenge has two basic components: an interpretation of Supreme Court precedents, and an argument about the sources of the immigration power.

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159. Cohen, *supra* note 2, at 421.

160. *Id.* at 421.

161. 8 U.S.C. § 1101(a)(42) (2018); *id.* § 1158(b)(2)(A)(i) (2018); see *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (analyzing the scope of the persecutor bar).

162. Congress has taken measures to discourage some kinds of persecution abroad; see the International Religious Freedom Act of 1998 (Public Law 105–292, as amended by Public Law 106–55, Public Law 106–113, Public Law 107–228, Public Law 108–332, and Public Law 108–458). But the question of whether such measures are within Congress’s power are completely separate from whether Congress has the power to directly prohibit similar conduct within the United States.

163. 8 U.S.C. § 1227(a)(1)(G) (2018).

164. Wishnie, *supra* note 2, at 494.

## a. Do Supreme Court Precedents Support Delegability?

Wishnie notes that the Supreme Court has repeatedly described the federal immigration power as exclusive.<sup>165</sup> For example, in 1875, the Court said, “The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”<sup>166</sup> The Court repeated this pronouncement many times, saying, for example, in *De Canas v. Bica* that “[p]ower to regulate immigration is unquestionably exclusively a federal power.”<sup>167</sup> And again in *Hampton v. Mow Sun Wong*: “[T]he authority to control immigration is . . . vested solely in the Federal Government, rather than the States.”<sup>168</sup>

To be sure, the Court just as often describes the power as “preeminent,”<sup>169</sup> or describes state powers as “subordinate,”<sup>170</sup> rather than describing federal power as “exclusive.” And, as Wishnie rightly notes, “Judicial declarations that the immigration power *arises* exclusively at the federal level, however, do not address the question whether the power may be transferred or delegated by Congress.”<sup>171</sup> So what evidence is there on the transferability or delegability of the power?

In *Chae Chan Pin v. United States*,<sup>172</sup> when the Supreme Court endorsed a federal power to exclude noncitizens from the United States, the Court said that the power of exclusion “cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other

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165. *Id.* at 530–31.

166. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

167. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 416 (1948) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.” (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893))); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (“[T]he power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continually existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law.”); *see also* *Edmond v. Goldsmith*, 183 F.3d 659, 664 (7th Cir. 1999) (Posner, C.J.) (describing “sovereign powers over foreign relations, foreign commerce, citizenship, and immigration . . . that states and cities do not possess” (citation omitted)), *aff’d sub nom*, *City of Indianapolis v. Edmond*, 521 U.S. 32 (2000).

168. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“[T]he authority to control immigration is . . . vested solely in the Federal Government, rather than the States . . .”).

169. *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

170. *Hines*, 312 U.S. at 68 (“[T]he power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law.”).

171. Wishnie, *supra* note 2, at 531.

172. 130 U.S. 581 (1889).

parties. They cannot be abandoned or surrendered.”<sup>173</sup> This is perhaps the clearest judicial statement against delegability to the states, but it is dicta. Statements in *Graham v. Richardson*, which struck down a state law, have been the focus of more debate.

*Graham* says that “Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.”<sup>174</sup> This might be thought to end the inquiry. But the defenders of delegability have come up with what they think are ways around this language.

First, it can be argued that the statement is dicta. *Graham* ultimately concluded that Congress had not authorized the state law at issue, which means the Court never needed to decide what would happen if Congress did in fact attempt to authorize a violation of the Equal Protection Clause.<sup>175</sup> But this argument, as stated, is wrong; what the Court said isn’t dicta. The reason the Court construed the federal statute not to authorize the state law was to avoid a serious constitutional problem.<sup>176</sup> In other words, *Graham* contains a *holding* that serious constitutional problems would be posed if Congress attempted to authorize the state law at issue.

Here, however, we need to keep our arguments straight. The constitutional problem *Graham* avoided was not a delegation problem; it was a uniformity problem. In the Court’s words, “A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity.”<sup>177</sup> The uniformity doctrine is not the same as delegation doctrine. So *Graham* does not hold that there are serious constitutional problems with a federal statute that delegates the power to discriminate; it says that there are serious constitutional problems with a federal statute that *non-uniformly* delegates the power to discriminate. This tells us little about the anti-delegation challenge.

Having established that *Graham* does not contain a holding on the delegation question, we come back to its comment that “Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.”<sup>178</sup> This comment prompts a clever argument: if Congress authorizes a state’s action, then that action necessarily isn’t a violation of the Equal Protection Clause. This is essentially what the Ninth and Tenth Circuits held, calling the *Graham* statement “almost tautological.”<sup>179</sup>

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173. *Id.* at 609.

174. *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (citing *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969)).

175. *Id.* at 382–83.

176. *Id.*

177. *Id.* at 382.

178. *Id.*

179. *Soskin v. Reinertson*, 353 F.3d 1242, 1254 (10th Cir. 2004); see *Korab v. Fink*, 797 F.3d 572, 583 (9th Cir. 2014) (quoting *Soskin*, 353 F.3d at 1254), *cert. denied sub nom.* *Korab v. McManaman*, 135 S. Ct. 472 (2014).

The Tenth Circuit wrote, “The question is not whether Congress can authorize such a constitutional violation. The question is what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens.”<sup>180</sup> It seems rather uncharitable to say that *Graham* gave us a gnomic tautology, when we could easily read it to offer simple instructions. But the problems with the Ninth and Tenth Circuit’s views go beyond that.

Curiously not discussed in the Ninth and Tenth Circuit’s analyses is the holding in *Hampton v. Mow Sun Wong*, perhaps the only Supreme Court case that directly bears on delegability of the immigration power.<sup>181</sup> The case involved a policy adopted by the U.S. Civil Service Commission excluding noncitizens from employment.<sup>182</sup> The Court avoided deciding whether Congress would have violated equal protection by adopting such a requirement.<sup>183</sup>

We may assume with the petitioners that if the Congress or the President had expressly imposed [a] citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes; but we are not willing to presume that the Chairman of the Civil Services Commission . . . was deliberately fostering an interest so far removed from his normal responsibilities.<sup>184</sup>

This was true even though it was fair to assume that Congress knew of the longstanding policy and had acquiesced in it.<sup>185</sup>

The Civil Service Commission “has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies.”<sup>186</sup> Nor does it have any responsibility for “the economic consequences of permitting or prohibiting the participation by aliens in employment opportunities . . . .”<sup>187</sup> The interests the Commission was responsible for “cannot provide an acceptable rationalization for such a determination by the [Civil Service Commission].”<sup>188</sup>

The Court didn’t use the language of anti-delegation; in one place it referred to the question as whether the Commission’s responsibilities

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180. *Soskin*, 353 F.3d at 1254.

181. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 99 (1976).

182. *Id.* at 90.

183. *Id.* at 103.

184. *Id.* at 105.

185. *Id.*

186. *Id.* at 114.

187. *Id.*

188. *Id.* at 116.

could provide “a rational basis” for the rule.<sup>189</sup> But the case functionally bars Congress from delegating to the Commission. *Hampton* is powerful evidence against the delegability of the power over immigration to the states: if the power can’t be delegated to a federal agency, then why should it be delegable to a separate sovereign?

b. Sources of the Immigration Power

Another way to challenge delegability is to go to the roots of the federal power. Wishnie reviews each of the constitutional sources of power that have been thought to support Congress’s power over immigration, and offers convincing arguments that the powers they support are not delegable to the states: not the naturalization power;<sup>190</sup> not the foreign-affairs power conferred on the President and Congress (despite a limited, conditional role allowed to the states);<sup>191</sup> not the foreign-commerce power (again, despite the fact that in some situations states may be allowed to tax or burden foreign commerce).<sup>192</sup>

Wishnie notes that the Supreme Court has often said that the immigration power additionally stems from an extraconstitutional source: the proposition, which the Court saw as self-evident, that power over immigration is “an incident of sovereignty.”<sup>193</sup> As the Court explained later, “The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.”<sup>194</sup> Wishnie argues that

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189. *Id.* at 115.

190. U.S. CONST. art. I, § 8, cl. 4; see *Chirac v. Chirac’s Lessee*, 15 U.S. (2 Wheat.) 259, 269 (1817) (Marshall, J.) (“That the power of naturalization is exclusively in congress does not seem to be, and certainly ought not to be, controverted . . .”); see Wishnie, *supra* note 2, at 533–38 (reviewing further historical evidence).

191. See *United States v. Pink*, 315 U.S. 203, 233 (1942) (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”). For a more detailed discussion, see Wishnie, *supra* note 2, at 538–44. The Constitution does give states the power to engage in certain foreign-affairs-related activity, including compacts with other nations, provided Congress consents. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”).

192. U.S. CONST. art. I, § 8, cl. 3; see Wishnie, *supra* note 2, at 544–49.

193. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 707–08 (1893) (citing scholars of international law); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions . . .”).

194. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936). “The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are

“if the power to regulate immigration truly derives from some fundamental attribute of sovereignty, relinquishment of that power must be tantamount to relinquishment of sovereignty.”<sup>195</sup> The reader’s willingness to accept this argument, presumably, will depend on their intuitions; as Wishnie acknowledges, “It is not possible, of course, to point to definitive text, history, or precedent denying Congress’s power to devolve powers inherent in national sovereignty . . . .”<sup>196</sup>

Notably, Jennifer Gordon has argued that the federal power over immigration is rooted not only in the sources above, but also in the federal power over *interstate* commerce.<sup>197</sup> This, she notes, “grounds that authority even more firmly in an arena without any carve-outs from constitutional oversight.”<sup>198</sup> While this may not directly affect the delegability argument, it would further support an argument against congressional support for state discrimination.

In sum, there are strong arguments against delegability, grounded both in Supreme Court precedent and in the constitutional sources of the immigration power. But is the question of delegability one that needs to be asked?

### 3. *How to Dodge the Question of Delegability*

Courts that have upheld state discrimination under the Welfare Reform Act have often found it possible to evade the question of delegation entirely.<sup>199</sup> For example, the Ninth Circuit’s decision in *Korab v. Fink*,<sup>200</sup> read carefully, considers only two arguments: that the Welfare Reform Act violates the uniformity requirement, and that Hawaii violated equal pro-

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necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.” *Id.* at 315–16.

195. Wishnie, *supra* note 2, at 552 (citing *Chae Chan Ping*, 130 U.S. at 609).

196. *Id.*

197. Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653, 671 (2018).

198. *Id.* at 702.

199. See *Korab v. Fink*, 797 F.3d 572, 584–85 (9th Cir. 2014); *Soskin v. Reinertson*, 353 F.3d 1242, 1254 (10th Cir. 2004) (applying rational basis scrutiny to Colorado’s PRWORA-based alien eligibility restrictions); *Hong Pham v. Starkowski*, 16 A.3d 635, 643–44 (Conn. 2011) (applying rational basis scrutiny to Connecticut’s PRWORA-based alien eligibility restrictions); *Khrapunskiy v. Doar*, 12 N.Y.3d 478, 480 (2009).

[I]n the years since Wishnie’s article, the courts that have sanctioned state denials of welfare benefits to immigrants under rational basis scrutiny have not considered the states to be exercising a delegated immigration power. Rather, PRWORA has served a different legitimizing function . . . courts have viewed federal policy much in the way they would in a preemption case: so long as Congress does not object to the states’ alienage-based denials of benefits, such measures are deemed valid and complementary to congressional policy.

Condon, *Equal Protection for Immigrants*, *supra* note 2, at 108.

200. 797 F.3d 572 (9th Cir. 2014).

tection by failing to provide benefits. *Korab* rejected both arguments, finding both the federal statute and the state action constitutional.<sup>201</sup>

The Ninth Circuit thought that if a state “is following the federal direction,” then the relevant level of equal-protection scrutiny is rational basis.<sup>202</sup> In other words, federal support somehow lowers the level of equal-protection scrutiny that applies to state actions. The dissent thought this confused the Supremacy Clause with equal-protection analysis.<sup>203</sup> But the majority insisted, somewhat icily, “We are not confused.”<sup>204</sup>

How could the state action survive equal-protection scrutiny without a congressional delegation of power? Wishnie thought that no other justification for the Ninth Circuit’s conclusion could make sense.<sup>205</sup> He recognizes that the Welfare Reform Act does not explicitly delegate power to the states, but argues that given current principles of equal protection and immigration law, “[T]he only possible defense of post-[Welfare Reform Act] state alienage classifications will be that Congress has delegated its power to regulate immigration.”<sup>206</sup>

It is conceivable, however, that a statute like the Welfare Reform Act could make it possible for a state’s actions to withstand equal-protection scrutiny even in the absence of a delegation of congressional authority. How would this work? Consider analogous contexts in which state anti-immigrant actions receive rational-basis scrutiny. When states bar nonci-

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201. *Id.* at 584.

202. *Id.* at 583 n.9.

203. *Id.* at at 602–03 (Clifton, J., dissenting).

204. *Id.* at 583 n.9. To be sure, the Ninth Circuit’s language sometimes seems to suggest delegation: “Congress has plenary power to regulate immigration and the conditions on which aliens remain in the United States, and Congress has authorized states to do exactly what Hawai’i has done here . . . .” *Id.* at 574.

205. Condon, *Equal Protection for Immigrants*, *supra* note 2, at 109.

Wishnie acknowledged that the devolution that is the focus of his argument was “not explicit” in PRWORA but “should be presumed because, under any other construction of the Welfare Act, the current rash of anti-immigrant state welfare rules are obviously invalid under *Graham*’s settled rule that state welfare discrimination against legal immigrants is unconstitutional.” But that framing fails to account for how federalism principles more broadly, even without delegation, could similarly and illegitimately undermine *Graham*. That is, delegation is not the only means by which courts might affect a rollback of *Graham*. Whereas Wishnie’s article took aim at the reasons why delegation could not insulate states from the requirements of equal protection (given his argument that the federal government cannot devolve the immigration power to the states), this Article argues Congress cannot through its own policy choices sanction state discrimination against immigrants.

*Id.* (footnote omitted).

206. Wishnie, *supra* note 2, at 528. He also thought it necessary to interpret the Welfare Reform Act as attempting a delegation, even though the act nowhere explicitly uses the language of delegation: “Although this devolution is not explicit, I argue that it should be presumed because, under any other construction of the Welfare Act, the current rash of anti-immigrant state welfare rules are obviously invalid under *Graham*’s settled rule that state welfare discrimination against legal immigrants is unconstitutional.” *Id.* at 496.

tizens from positions in their government, the usual strict scrutiny is relaxed, and rational-basis scrutiny applies.<sup>207</sup> This is not because the federal government has delegated any power to the states, but because a fact about the situation (in this case, the fact of state sovereignty) makes the state's action easier to justify.<sup>208</sup> It might similarly be the case that the fact of congressional approval makes the state's action easier to justify, without any transfer of power from Congress to the state.

Even if Congress can't delegate any particular power, courts might decide to lower scrutiny in light of *consistency with federal policy*.<sup>209</sup> On this view, there is no delegation issue to resolve. We merely lower scrutiny in light of the background fact that Congress is happy. That fact, like facts about the class targeted (in the case of undocumented people) or facts about the nature of the state interest (in the political-function cases), can result in lowered scrutiny.

If the question is whether we should construe the Welfare Reform Act as attempting a delegation of power, as opposed to some other method of supporting discrimination, advocates may not need to answer it. On the contrary, it may be necessary to rebut every possible theory on which the Welfare Reform Act could be upheld. Courts have thus far upheld the Welfare Reform Act on the theory that congressional approval is a reason to lower scrutiny, rather than a delegation, but that could change. Advocates should thus remain ready to rebut the claim that Congress can delegate its powers.<sup>210</sup>

And then they'll have to address the question of equal protection itself.

### III. CHALLENGING STATES' ROLE IN DISCRIMINATORY COOPERATIVE FEDERALISM

The challenges discussed above are all aimed at the federal statutes that make discriminatory cooperative federalism possible. It is important to distinguish between challenges to those federal statutes and challenges to the action states take as part of discriminatory cooperative-federalism

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207. The doctrine that state governments can exclude noncitizens from certain kinds of government employment (typically employment that involves some degree of policy-making) is expressed in cases like *Cabell v. Chavez-Salido*, 454 U.S. 432, 436, 439 (1982); *Ambach v. Norwick*, 441 U.S. 68, 80–81 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978).

208. See *Cabell*, 454 U.S. at 439.

209. See Condon, *supra* note 2, at 147–48.

210. See Condon, *Equal Protection for Immigrants*, *supra* note 2, at 108.

[W]hen courts accept that Congress has created a uniform immigration rule for states to follow, they are really concluding that Congress has set immigration policy, which the Supremacy Clause requires states to follow; they are not ruling that Congress has shared (or devolved) immigration rulemaking power so that the states may set their own immigration law.

*Id.*



programs.<sup>211</sup> Noncitizens who have been subjected to discrimination under a cooperative-federalism scheme should know that they have the right to challenge either element in such a scheme: the federal statute that authorizes or encourages discriminatory state action, and the state laws that are passed under the federal scheme.

State laws that form part of a discriminatory-cooperative-federalism scheme can often be challenged on multiple grounds. There may be various theories available under state constitutions; for example, in New York, a denial of benefits under the Welfare Reform Act was successfully challenged under a state constitution provision that guarantees adequate aid and care to the needy.<sup>212</sup> But the most common kind of challenge that has been brought so far, and the one that has divided courts nationwide, is a challenge under the federal Equal Protection Clause.

An equal-protection claim has two basic components: differential treatment, and a lack of justification. In other words, plaintiffs asserting a denial of equal protection must say first that they are being treated differently than someone similarly situated and second that there is no adequate justification for that differential treatment.<sup>213</sup> When a state treats citizens and noncitizens differently, federal approval functions as a potential justification for the differential treatment. The issue is whether it can be a successful justification.

This framework is very different from the delegation framework discussed above, in which federal authorization confers *power* on the state. In the equal-protection framework, the federal scheme gives states justification, not power. Thus, the question in equal-protection analysis is not whether the federal government has given states authority, but whether it has given them a sufficient *reason* for the differential treatment.

Courts have differed sharply on how the Equal Protection Clause applies to discriminatory cooperative federalism in part because they have sharply different views about which factors should count as part of the analysis. In particular, courts disagree about whether to consider, as part of equal-protection analysis, concerns about uniformity of federal statutes and delegability of federal powers. As discussed above, uniformity and delegability are concerns about the *federal* statutes that make discrimina-

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211. *Cf. id.* at 108–10 (noting that delegation and uniform-rule analyses cannot answer important questions about the level of equal-protection scrutiny that applies to state discrimination against noncitizens).

212. *Aliessa v. Novello*, 96 N.Y.2d 418, 427–28 (2001). *Finch* was based on the state equal protection clause. *Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 668 (2011).

213. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike” (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982))); *id.* at 453 (Stevens, J., concurring) (“In every equal protection case, we have to ask certain basic questions” including “[w]hat is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?”).

tory cooperative federalism possible. Once this is understood, we can simplify the equal-protection analysis significantly: delegability and uniformity are reasons to challenge federal statutes, and they can therefore be kept separate from equal-protection analysis.

But the core conceptual question of whether federal approval changes the equal-protection analysis will not be so easy to eliminate. Another way to frame this question is to say that we need to understand what level of equal-protection scrutiny applies to actions that states take as part of discriminatory-cooperative-federalism schemes. As Section III.A will explain, courts have divided on this question.

Section III.B will propose that to decide what level of scrutiny applies, we will have to understand the reasons courts have applied strict scrutiny in other immigration-related contexts, so that we can then decide whether those reasons apply here. I argue that courts have applied strict scrutiny to specific groups for at least two reasons: to prevent states from taking account of morally irrelevant factors, and to prevent the subordination of specific groups. Both of those reasons apply forcefully in the immigration context.

Section III.C takes this understanding of strict scrutiny and applies it to discriminatory cooperative federalism. If the goal of strict scrutiny is to prevent states from taking account of morally irrelevant factors, and to prevent the subordination of noncitizens, then strict scrutiny should apply to the actions states take as part of discriminatory cooperative-federalism schemes. Strict scrutiny should apply whenever states have a choice.

Section III.D explains that it can be tricky to determine when states have a meaningful choice. As explained in Part I, above, some federal statutes give states no choice at all, while others give states a conditional choice, or otherwise put states under significant constraints. I'll propose a solution to this problem: whenever states have a meaningful choice, strict scrutiny should apply.

#### A. *What Level of Scrutiny Should Apply to Discriminatory Cooperative Federalism?*

Courts have long been perplexed by whether congressional approval can justify state discrimination against noncitizens.<sup>214</sup> Some courts have held that when Congress approves the discrimination, the appropriate level of judicial scrutiny is rational-basis scrutiny. The Tenth Circuit in *Soskin* held that rational-basis review applies when state law “effectuate[s] national policy.”<sup>215</sup> Even though courts are reviewing state laws, they are

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214. For example, the majority and dissent in *Korab*, arguing about whether Congress's intent was relevant to the equal-protection question, accused each other of being confused about whether the issue presented was equal protection or preemption. See *supra* notes 193–194 and accompanying text.

215. *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004).

in effect reviewing congressional policy, and should therefore defer to that federal policy.<sup>216</sup>

The Ninth Circuit in *Korab* reasoned similarly, describing a noncitizen's challenge to congressionally approved state discrimination as "a backdoor challenge to the federal classifications."<sup>217</sup> The implication is that plaintiffs cannot challenge the state action without also invalidating the federal statute, but the court did not explain why this is true. Just as a state could be barred from taking part in a cooperative-federalism scheme by a state constitutional prohibition,<sup>218</sup> an injunction against a state's action based on the Equal Protection Clause would not necessarily run against the federal statute.

Rational-basis scrutiny applied, the court said, "because Hawai'i is merely following the federal direction set forth by Congress under the Welfare Reform Act."<sup>219</sup> But the court made little effort to explain the mechanism by which congressional approval lowered equal-protection scrutiny.

Other courts have held that Congress's approval doesn't matter: in essence, whenever a state has control over its treatment of noncitizens, the usual strict scrutiny applies.<sup>220</sup> The Massachusetts Supreme Judicial Court applied strict scrutiny to the exclusion of certain noncitizens from a program (part of what is now sometimes called "Romney Care") that helped pay the costs of beneficiaries' health insurance.<sup>221</sup> The Welfare Reform Act gave the state discretion to effect just such a denial, but this did not

216. *Id.*

217. *Korab*, 797 F.3d at 579; *cf.* HOWLIN' WOLF, BACK DOOR MAN (Weton-Wesgram 1961) ("When everybody trying to sleep, I'm somewhere making my midnight creep / Every morning the rooster crow, something tell me I got to go / I am a back door man.").

The court in *Korab* also viewed the plaintiffs as asking the state to replace federal funds the federal government had chosen to withdraw. Granting this relief, the court said, would compel the state "to provide wholly state-funded benefits equal to Medicaid to [the relevant noncitizens], thus effectively rendering meaningless the discretion Congress gave to the states in 8 U.S.C. § 1622(a)." *Korab*, 797 F.3d at 582 (citing *Sudomir v. McMahon* 767 F.2d 1456, 1466 (9th Cir. 1985)).

218. *See Aliessa v. Novello*, 96 N.Y.2d 418, 427–28 (2001).

219. *Korab*, 797 F.3d at 584. Curiously, *Korab* never identifies the rational basis for the state's action.

220. *See Rosenberg, supra* note 2, at 1461 ("State public-benefit schemes that deny joint-funded benefits to aliens for whom federal law permits eligibility are unconstitutional because they effect alienage classifications as a matter of state discretion.").

221. The program at issue in *Finch* was a state program called Commonwealth Care that received federal funds to partially reimburse the state for benefits given to citizens and some noncitizens; noncitizens who were ineligible for comparable federal benefits could get benefits from the program, but the state received no reimbursement for them. *Finch*, 459 Mass. at 659. The state then passed a statute making federally ineligible noncitizens ineligible for Commonwealth Care, but simultaneously creating a new state program (Commonwealth Bridge) for which those noncitizens were eligible. *Id.* at 660.

change the court's mind about the level of scrutiny.<sup>222</sup> The key factor was that Congress had given the state discretion, rather than imposing a mandate: "Where the State is left with a range of options including discriminatory and nondiscriminatory policies, its selection amongst those options must be reviewed under the standards applicable to the State and not those applicable to Congress."<sup>223</sup>

The Maryland Supreme Court likewise applied strict scrutiny to a denial of state benefits to noncitizens, even though that denial was authorized by the Welfare Reform Act.<sup>224</sup> But the Maryland court blurred multiple analyses together. It rejected the state's argument, which was that rational basis should apply because the Welfare Reform Act "pre-

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222. *Id.* at 673.

223. *Id.* at 674. The federal government will be subsidizing the state's provision of benefits to some residents (citizens and eligible aliens) but not to others (federally ineligible aliens). "This is a financial impediment to State action but not a mandate under the supremacy clause that might require the application of rational basis review." *Id.*

Finch distinguished an earlier case, *Doe v. Commissioner of Transitional Assistance*, 437 Mass. 521, 522 (2002), by suggesting that *Doe* involved a federal mandate, rather than a federal statute that gave discretion to the states: "In reaching our conclusion in *Doe*, however, we did not bridge the analytical gap between congressional action 'dictating how States are to regulate and legislate issues relating to aliens' and the State's responsibilities where Congress enacts a noncompulsory rule and the Commonwealth voluntarily 'adopt[s] those national policies and guidelines.'" *Finch*, 459 Mass. at 671. That was a partial truth.

*Doe* involved a state program, Temporary Assistance for Families with Dependent Children, which was funded partly by the federal Temporary Assistance for Needy Families program. In other words, it was jointly funded. *Id.* The Welfare Reform Act barred "qualified aliens" from receiving benefits through this program until they'd been residents for five years. 8 U.S.C. § 1613(a) (2018). Massachusetts amended its law to conform to this requirement, and the *Doe* court upheld that amendment. *Doe*, 437 Mass. at 526–27 ("[I]t would make no sense to say that Congress has plenary power to legislate national immigration policies and guidelines subject to a deferential (rational basis) standard of review, and then to hold that the equal protection clause of the Constitution restrains States from adhering to or adopting those national policies and guidelines because their actions are subject to a higher (strict scrutiny) standard of review.").

But *Doe* also involved as second provision of the same state law, which created a supplemental program, exclusively for noncitizens, and then imposed different residency requirements on those noncitizens depending on their immigration status. *Id.* at 528. The court found that this provision distinguishes on the basis of residency, not alienage, and therefore applied rational-basis scrutiny. *Id.* at 533–34. Since only noncitizens were subject to the residency requirement, this reasoning is questionable at best.

224. *Ehrlich v. Perez*, 394 Md. 691, 711 (2006). The program in *Ehrlich* was a state-funded program created to give medical assistance to noncitizens who had been excluded from Medicaid by the Welfare Reform Act. *Id.* at 703. But the state government then eliminated funding for the program. *Id.* at 704–05. *Ehrlich* applied both the state and federal equal-protection clauses. *Id.* at 716 ("[E]ven though Appellees ground their equal-protection challenge solely on Article 24 [of the Maryland Declaration of Rights], we shall consider the argument in light of both cases interpreting and applying the Equal Protection Clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights.").

scribed a uniform rule for the treatment of an alien sub-class in regard to the provision of medical benefits, which Maryland could follow.”<sup>225</sup> The argument it considered, in other words, was “whether the State action here is shielded by the ‘uniform rule’ theory from what otherwise should be a strict scrutiny standard of review.”<sup>226</sup> As I argued above, this is a misunderstanding of the uniformity issue, which relates to the validity of the federal law, not the state action taken under it. It is perfectly conceivable that the level of scrutiny could be reduced on the ground that the state is implementing federal policy even if the federal law does not create a uniform rule. The government’s confused theory of the case didn’t create any problematic precedent, however, because the Maryland court rejected the theory. In doing so, it held both that the relevant federal power was nondelegable<sup>227</sup> and that the Welfare Reform Act creates no uniform rule.<sup>228</sup> It did not separately discuss whether rational-basis scrutiny should apply because of the mere fact that Congress apparently approved of the state action.

In short, while some courts have held that federal approval lowers the level of equal-protection scrutiny, others have held that it does not. To decide who is right, and whether federal approval should affect the level of equal-protection scrutiny, it will be necessary to attain a more precise understanding of how courts determine when strict scrutiny applies and when it doesn’t. Unfortunately, this is not a question that has a clear answer.

#### B. *Well, What Level of Scrutiny Should Apply Anywhere?*

To understand whether strict scrutiny should apply to state discrimination that the federal government supports, it will be necessary to resolve a longstanding controversy over the equal-protection rights of noncitizens.

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225. *Id.* at 709.

226. *Id.* at 722.

227. *Id.* at 725 (2006) (“It is not disputed that the federal government may authorize States to legislate concurrently in subject areas in which it has acted; yet, it is less evident to this Court that the federal government expressly may transfer its authority (and thus justify a relaxed level of scrutiny of the resultant State action) to the States in order to regulate in the area of immigration in a manner that would be permissible if done by the federal government, but unconstitutional if carried out independently by an individual State.” (citing *Mathews v. Diaz*, 426 U.S. 67 (1976); *Graham v. Richardson*, 403 U.S. 365 (1971))).

228. *Id.* at 725–26 (“Assuming that the power over immigration and naturalization possessed by the federal government includes establishing a single, uniform, and articulated directive for treating aliens regarding State-only funded medical assistance benefits, such that we will employ a rational basis standard of review to a State’s elimination of State-only funded benefits for certain resident aliens, we conclude that PRWORA prescribes no uniform rule in any event. Rather, Congress has provided discretion to the States with regard to their decisions whether to provide State-funded medical benefits, on the basis of alienage, to those resident aliens who do not meet the requirements for federal medical assistance. The grant of discretion, without more, is not a uniform rule for purposes of imposing only a rational basis test.” (footnote omitted)).

Some scholars, and at least one judge, have argued against the very idea of strict scrutiny for noncitizens. They accept that states shouldn't generally regulate immigration. But they think that the reason for barring state regulation of immigration is preemption, not equal protection.<sup>229</sup> Noncitizens don't really have rights under the Equal Protection Clause, they think; it's the federal government that has the right to exclusive control over immigration issues. So it's true that states can't generally discriminate against noncitizens, but only because state discrimination encroaches on the federal government's exclusive domain.

If this argument is correct, then discriminatory cooperative federalism poses no equal-protection problem at all. If the only reason to restrict state regulation of immigration is to protect federal power, then federal support disposes of all possible problems. If, on the other hand, there are other reasons to restrict state regulation of immigration, then courts might have to restrict state regulation of immigration even in cases of federal support. So the debate over discriminatory cooperative federalism forces courts to take a position in this longstanding debate.

This Section of the Article first explains why some have argued that equal-protection scrutiny, in the immigration context, exists only to protect federal power. It then explains why there are in fact other reasons for equal-protection scrutiny. This sets up the following section, which applies those other reasons to the case of discriminatory cooperative federalism.

#### 1. *Is Federal Power the Reason States Can't Discriminate Against Noncitizens?*

In the immigration context, there has always been a close relationship between equal protection and federal power. Early Supreme Court cases that struck down state anti-immigrant laws using equal protection<sup>230</sup> tended to discuss federal power in the course of their equal-protection analysis.<sup>231</sup> In those cases, federal power has played an important role in the equal-protection analysis.<sup>232</sup>

In *Graham*, for example, Congress had made clear "that as long as [noncitizens] are here they are entitled to the full and equal benefit of all state laws for the security of persons and property."<sup>233</sup> But the challenged state laws imposed "auxiliary burdens upon the entrance or residence of aliens who suffer the distress, after entry, of economic dependency on

229. This argument is based partly on the way cases like *Graham* sometimes seem to blur equal protection and federal power. See *infra* notes 231–235.

230. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); *Truax v. Raich*, 239 U.S. 33, 41 (1915).

231. See, e.g., *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) ("State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.").

232. See *Condon*, *Equal Protection for Immigrants*, *supra* note 2, at 111.

233. *Graham v. Richardson*, 403 U.S. 365, 378 (1971).

public assistance.”<sup>234</sup> The state laws thus “equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible.”<sup>235</sup>

Early commentators noted that *Graham*’s equal-protection holding was thus unnecessary. It could have stopped with the finding that federal law preempted the state laws. Indeed, it should have done so, given the general principle that courts should, when possible, avoid striking down laws in a way that Congress can’t undo.<sup>236</sup>

And that’s just what more recent Supreme Court cases have done: used a preemption framework, without discussing equal protection, to address the lawfulness of state laws that adversely affect noncitizens.<sup>237</sup> Wherever there is an issue about noncitizens and equal protection, there is also a preemption issue, because any state discrimination against noncitizens also must be analyzed to see if the state law infringes on federal power. (Discriminatory cooperative federalism is a case where the state law plainly does not contravene federal policy, which is why it may be the key to these debates.) For example, in *Toll v. Moreno*, the Court struck down a Maryland rule that denied in-state tuition to certain noncitizens (specifically, those on G-4 diplomatic visas).<sup>238</sup> The district court had concluded that the rule violated the Equal Protection Clause, but the Supreme Court struck it down on the basis of preemption.<sup>239</sup>

The question, then, is whether there is a need for the two overlapping doctrines of preemption and equal protection. When states discriminate against noncitizens, is there a need for two vectors along which the state law might be challenged? Some scholars, and at least one judge, have argued that in this context, the courts’ equal-protection analysis is really just another form of preemption analysis, and that we would be better off dispensing with the language of equal protection altogether.

In 2014, Judge Jay Bybee on the Ninth Circuit wrote a concurrence arguing that cases involving state discrimination against noncitizens should no longer be analyzed under the Equal Protection Clause; instead, they should be analyzed only as preemption cases.<sup>240</sup> It is important not to mistake one concurrence for a movement, and Judge Bybee is in some respects a marginal figure. At the very least, he has been a controversial one since the revelation that during his service in the Office of Legal

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234. *Id.* at 378–79.

235. *Id.* at 380.

236. See Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 187–88 (1982).

237. Cases that use the Supremacy Clause rather than an equal-protection framework include *Toll v. Moreno*, 458 U.S. 1, 9–10 (1982), and *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 587 (2011).

238. *Toll*, 458 U.S. at 9–10.

239. *Id.*

240. *Korab v. Fink*, 797 F.3d 572, 598 (2014) (Bybee, J., concurring).

Counsel he signed memos justifying the Bush Administration's use of waterboarding and other forms of torture.<sup>241</sup> But he is not alone in arguing against the application of equal-protection doctrine to noncitizens; his arguments mirror a long-present current in equal-protection thinking. For the last fifty years, articles by a series of scholars have urged the Supreme Court to replace equal-protection scrutiny of state laws affecting noncitizens with preemption analysis.<sup>242</sup>

The difference in doctrines matters. If equal-protection challenges are a real, independent basis for challenging state discrimination against noncitizens, then federal permission doesn't change things.<sup>243</sup> If, on the other hand, equal-protection challenges to state discrimination against noncitizens are based on a lack of federal authority, then federal authorization solves the problem and there can be no equal-protection challenge. If we abolish equal-protection scrutiny for laws that treat noncitizens differently, then discriminatory cooperative federalism is unambiguously permissible.

Commentators have offered both a descriptive and a normative argument for the preemption-only view. The descriptive argument is a claim that preemption better explains the case law in this area. The normative argument is that there is nothing wrong with states' taking immigration status into account in their policymaking; unlike race, for example, immigration status is a morally relevant factor that states can properly base policy on. Neither is convincing. The following two sections will consider them in turn.

## 2. *Does the Case Law Make More Sense Without Equal Protection?*

The first argument against continuing to apply equal-protection scrutiny is that an approach based on preemption alone would be conceptually neater, in that it would better explain existing case law. Bybee writes that the *Graham* doctrine is "riddled with exceptions and caveats that make consistent judicial review of alienage classifications difficult."<sup>244</sup> But By-

241. See Karl Vick, *Friends Say Judge Bybee Regrets Interrogation Memo He Signed*, WASH. POST (Apr. 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/24/AR2009042403888.html> [<https://perma.cc/56FE-AE8X>]; see also OFFICE OF PROF'L RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF 'ENHANCED INTERROGATION TECHNIQUES' ON SUSPECTED TERRORISTS 159, 259 (2009) (finding Bybee's conclusions to represent misconduct); Memorandum from David Margolis, Op. Assoc. Deputy Att'y Gen. 67–69 (2010), <https://fas.org/irp/agency/doj/opr-margolis.pdf> [<https://perma.cc/RQ6L-GN6Y>] (finding Bybee's conclusions to represent mere "bad judgment").

242. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 65 (1969); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1070 (1979); Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L.J. 940, 941–42 (1980).

243. See Marisa Ann Tostado, *Alienation: Congressional Authorization of State Discrimination Against Immigrants*, 31 LOY. L.A. L. REV. 1033, 1052 (1998).

244. *Korab*, 797 F.3d at 585.



bee never attempts to show that the exceptions are confusing, only that they exist.<sup>245</sup> As Condon notes, doctrines that have exceptions are not necessarily incoherent.<sup>246</sup> If we are going to abolish all doctrines that have more than two exceptions, there is a long, dark night ahead of us. The hearsay rule, which has at least twenty-nine exceptions (to say nothing of its “exclusions”), will have to go to the gallows long before *Graham* gets there.<sup>247</sup>

Bybee also argues that the alienage-strict-scrutiny cases are in tension with the general principle that equal-protection doctrine applies equally to Congress and the states; it is very unusual to apply different scrutiny to Congress and the states.<sup>248</sup> True, but this cuts both ways. While Bybee takes it to mean we should abandon the idea of applying strict scrutiny to the states, the tension could just as easily be assuaged by applying strict scrutiny to Congress’s discrimination against noncitizens. (If this idea seems unthinkable, because the application of strict scrutiny would effectively erase immigration law, remember that we are discussing alienage cases, not cases involving admission and deportation; it seems unlikely that foreign powers would be aggravated if Congress were required to treat noncitizens and citizens alike in the distribution of benefits.) Anyone who wants the Equal Protection Clause to treat states and Congress alike has to explain why both should get a free pass, rather than neither.

Preemption, according to some writers, does a better job explaining both why states are not generally allowed to discriminate against noncitizens and why specific exceptions to this principle exist.<sup>249</sup> Consider, for

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245. Bybee writes,

In the years since *Graham* was decided, the Supreme Court has applied different levels of scrutiny depending on whether the state or the federal government established the challenged restriction, whether the restriction involved economic rights or the democratic process of self-government (often stretching that concept), whether the restriction involved undocumented aliens, and whether the discriminatory classification was created by Congress or an administrative agency.

*Id.* None of these exceptions seem particularly difficult to apply, with the possible exception of the second one (cases involving the democratic process of self-government), which was not at issue in *Korab*.

246. Condon, *Equal Protection for Immigrants*, *supra* note 2, at 105. Condon writes, “This is an odd argument given that exceptions, in fact, can bring coherence to a rule that does not apply in every case.” *Id.*

247. See FED. R. EVID. 803 (listing twenty-three exceptions to the hearsay rule); FED. R. EVID. 805 (five more exceptions); FED. R. EVID. 807 (another exception); see also FED. R. EVID. 801 (“exclusions” from hearsay).

248. *Korab*, 797 F.3d at 587–91 (Bybee, Circuit J., concurring); see *Bolling v. Sharpe*, 347 U.S. 497 (1954).

249. Jesse Choper, for example, argued that preemption would serve better than equal protection to explain why states cannot discriminate against noncitizens. *Comments of Jesse Choper*, in JESSE H. CHOPER, YALE KAMISAR, & LAURENCE H. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS: 1981–1982: AN EDITED TRANSCRIPT OF THE FOURTH ANNUAL SUPREME COURT REVIEW AND CONSTITUTIONAL LAW SYMPOSIUM* 16–17 (ed. Dorothy Opperman 1983). Choper was uncomfortable with the idea that equal-protection doctrine could allow federal discrimination

example, the exception to strict scrutiny for discrimination against undocumented people.<sup>250</sup> When a person is lawfully present, it is fair to assume that Congress does not want states to discriminate against them, because discrimination makes their residence in the state more difficult than Congress intended.<sup>251</sup> But only when they are lawfully present. If preemption is the real reason why states can't discriminate against noncitizens, then it makes sense that undocumented people would be exempted,<sup>252</sup> because the federal government has not made clear any intention for states to allow them residence.<sup>253</sup>

Similarly, preemption arguably explains the political-function exception to strict scrutiny (the doctrine under which states are not subject to strict scrutiny when they exclude noncitizens from employment in government jobs whose officeholders exercise the political power of the community).<sup>254</sup> Equal protection does not deny states the right to exclude noncitizens from the political process, because Congress excludes them from the federal political process and thus presumably does not mind states doing the same.<sup>255</sup>

Notably, preemption would not explain why some circuits have applied rational-basis scrutiny to laws that discriminate against people with temporary visas.<sup>256</sup> Congress presumably no more wanted states to bur-

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against noncitizens, but not state discrimination. *Id.* It would be conceptually much neater, he thought, to say that Congress's exclusive power over immigration preempts state distinctions between citizens and noncitizens. *Id.* Choper makes the same argument about *Plyler v. Doe*; he thinks that the Court could have held that the statute denying undocumented children an education violated the Supremacy Clause, not the Equal Protection Clause. *Id.* at 29–30.

250. See *Dandamudi v. Tisch*, 686 F.3d 66, 73–74 (2d Cir. 2012) (discussing exception to strict scrutiny for state laws that discriminate against the undocumented). Full disclosure: I argued *Dandamudi* on behalf of the state.

251. Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1063–64 (1979).

252. See *Dandamudi*, 686 F.3d at 74 (discussing exception to strict scrutiny for state laws that discriminate against the undocumented).

253. Of course, this argument (that preemption does not provide a reason for strict scrutiny protection of the undocumented) could just as easily be a reason to criticize the courts' refusal to apply strict scrutiny to the undocumented. See Condon, *Equal Protection Exceptionalism*, *supra* note 28, at 567–68; see also Levi, *supra* note 242, at 1080 ("Certainly if resident aliens are 'discrete' and 'insular,' isolated by language and culture, then illegal and nonimmigrant aliens are even more vulnerable." (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971))).

254. See *Cabell v. Chavez-Salido*, 454 U.S. 432, 436–39 (1982); *Ambach v. Norwick*, 441 U.S. 68, 80–81 (1979); *Foley v. Connelie*, 435 U.S. 291, 296–97 (1978).

255. See Levi, *supra* note 242, at 1079.

256. See *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 533 (6th Cir. 2007); *LeClerc v. Webb*, 419 F.3d 405, 410 (5th Cir. 2005), *hearing en banc denied*, 444 F.3d 428 (2006). Justice Rehnquist also sought such an exception to strict scrutiny. See *Toll v. Moreno*, 458 U.S. 1, 44–45 (1982) (Rehnquist, J., dissenting).

den those noncitizens than to burden lawful permanent residents. But perhaps (as the Second Circuit thinks) those courts are simply wrong.<sup>257</sup>

All of these arguments about the exceptions to strict scrutiny are vulnerable to three persuasive counterarguments. First, if indeed these exceptions represent a troubling inconsistency in equal-protection doctrine, then it might just as well be the exceptions, rather than the doctrine itself, that should be abandoned. Second, conceptual simplicity is hardly a reason to abandon constitutional protection for a threatened group.<sup>258</sup> And, third, the Supreme Court has offered its own reasons for the exceptions, and there is no reason to believe it was hiding a preemption card up its sleeve when it did so.<sup>259</sup> To those reasons, and the normative case for strict scrutiny, the next section turns.

### 3. *Is Immigration Status Morally Relevant?*

The normative argument for dispensing with strict scrutiny of state laws affecting noncitizens is that immigration status matters. In other words, states have legitimate reasons for taking account of immigration status when they make policy. Citizens and noncitizens are not similarly situated, and so there is no objection to treating them differently.

The purpose of equal-protection doctrine, according to one theory, is to ensure that the government treats similarly situated groups similarly. On this view, the Equal Protection Clause “keeps governmental decision makers from treating differently persons who are in all relevant respects alike.”<sup>260</sup> Adopting this approach, Perry writes that the purpose of equal-protection doctrine is to prevent governments from taking account of statuses that are not morally (i.e., properly or legitimately) relevant to policymakers’ decisions.<sup>261</sup> If the purpose of strict scrutiny is to ensure that state governments never take morally irrelevant matters into consideration in their policymaking, the question is whether it is ever legitimate for immigration status to play a role in policy.

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257. See *Dandamudi*, 686 F.3d at 74–75.

258. Then again, as Condon observes, if courts had all along been applying a form of preemption analysis and mistakenly calling it equal protection, it would be better to start being candid about it. Condon, *Equal Protection for Immigrants*, *supra* note 2, at 105.

259. As for the level of scrutiny for state laws that discriminate against the undocumented, the Court said that “Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct.” *Plyler v. Doe*, 457 U.S. 202, 219 (1982). As for the political function cases, the Court said, “We recognize a State’s interest in establishing its own form of government, and in limiting participation in that government to those who are within ‘the basic conception of a political community.’” *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

260. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

261. Perry, *supra* note 251, at 1083 (“[G]overnment may not discriminate against a person on the basis of a trait or other factor indicating nothing about the person’s moral status.”).

Perry writes, “It is tempting to say, in a generous if unreflective spirit of egalitarianism, that a person’s status as an alien indicates nothing about the worth or desert of the person.”<sup>262</sup> But immigration status *is* morally relevant to policy, he thinks, because “the members of a political community may appropriately decide whether, to what extent, and under what conditions persons who are not members may enter the territory of the political community and share its resources and largesse.”<sup>263</sup> Harold Koh remarked that there is “something coldly compelling” about this approach.<sup>264</sup>

But Perry is wrong. From the perspective of the states, the very preemption considerations that give rise to the preemption-only view show that there is nothing relevant about citizenship. The Supreme Court recognized as much in *Flores de Otero*, when it explained that there are two reasons for applying strict scrutiny to noncitizens: protection of a discrete and insular minority, and states’ lack of power over immigration-related issues.<sup>265</sup> When Puerto Rico argued that its anti-immigrant law was justified by its interest in preventing an influx of migrants to Puerto Rico, the Court held that this justification was “at odds with the Federal Government’s primary power and responsibility for the regulation of immigration.”<sup>266</sup>

The same rationale applies to any state attempt to single out noncitizens for adverse treatment: it is the federal government, not the states, that should decide whether immigration status carries adverse consequences. Immigration is none of the states’ business. This is the flip side of the plenary power: if immigration is exclusively Congress’s domain, then states can’t use immigration status to justify their policies. As the Court wrote in *Diaz*, “division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and

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262. *Id.* at 1061.

263. *Id.*

264. See Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 95 (1985).

265. *Flores de Otero*:

The underpinnings of the Court’s constitutional decisions defining the circumstances under which state and local governments may favor citizens of this country by denying lawfully admitted aliens equal rights and opportunities have been two. The first, based squarely on the concepts embodied in the Equal Protection Clause of the Fourteenth Amendment and in the Due Process Clause of the Fifth Amendment, recognizes that “(a)liens as a class are a prime example of a ‘discrete and insular’ minority . . . for whom . . . heightened judicial solicitude is appropriate.” The second, grounded in the Supremacy Clause, Const., Art. VI, cl. 2, and in the naturalization power, Art. I, § 8, cl. 4, recognizes the Federal Government’s primary responsibility in the field of immigration and naturalization.

*Examining Bd. of Eng’rs, Architects & Surveyors v. Flores De Otero*, 426 U.S. 572, 602 (1976) (alterations in original) (citations omitted) (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

266. *Id.* at 605.

aliens has no apparent justification.”<sup>267</sup> For states, immigration matters are, as Condon puts it, *ultra vires*.<sup>268</sup>

The Supreme Court took this view in *Nyquist v. Mauclet*,<sup>269</sup> in which the challenged state law barred certain noncitizens from financial assistance for higher education unless they affirmed their intent to apply for citizenship when they became eligible.<sup>270</sup> One of the justifications New York offered was that its law would give noncitizens an incentive to naturalize.<sup>271</sup> But this purpose, the Court held, “is not a permissible one for a State. Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere.”<sup>272</sup>

All of these precedents establish that states have no legitimate business trying to influence immigration policy. But states have other policy objectives to which immigration status could, in theory, be relevant.

For example, states do not act *ultra vires* when they try to ensure the protection of the public from licensed professionals who misbehave themselves. States have attempted to argue that immigration status is relevant to these efforts.<sup>273</sup> Perhaps people with temporary immigration status are more likely to leave the country sooner, thus placing themselves beyond the bounds of a state’s regulatory-enforcement powers.

The Second Circuit persuasively rejected arguments of this kind in *Dandamudi*.<sup>274</sup> To be sure, noncitizens might leave the country. But so might citizens. And noncitizens might also adjust to permanent status. There is too much uncertainty involving anyone’s future to say that states need to use immigration status as a proxy for whether someone is likely to stay subject to the state’s regulatory-enforcement powers. Moreover, states are free to use other proxies if they want; for example, if the law permits, they could impose durational-residency requirements, or require regulated professionals to deposit a bond.

As the *Graham* decision emphasizes, noncitizens for most purposes are functionally identical to citizens. “Aliens like citizens pay taxes and may be called into the armed forces.”<sup>275</sup> And they “may live within a state for many years, work in the state and contribute to the economic growth of the state.”<sup>276</sup> Once we take the goal of influencing immigration policy

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267. *Mathews v. Diaz*, 426 U.S. 67, 85 (1976).

268. Condon, *Equal Protection for Immigrants*, *supra* note 2, at 112.

269. 432 U.S. 1 (1977).

270. *Id.* at 2.

271. *Id.* at 9–10.

272. *Id.* at 10 (citing U.S. CONST., art. I, § 8, cl. 4).

273. Full disclosure: I articulated arguments of this kind when I briefed and argued the *Dandamudi* case.

274. *See Dandamudi v. Tisch*, 686 F.3d 66, 75–77 (2d Cir. 2012).

275. *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

276. *Id.*

off the table for states, it is difficult to imagine any situation in which states would have a legitimate need to take account of immigration status.

In sum, it is difficult to imagine a legitimate reason why states would need to take account of immigration status in their policymaking. Thus far, the case for abolishing equal protection for noncitizens is unpersuasive. We've seen that there is nothing gained, normatively speaking, by allowing states to consider immigration status. Now we should ask whether, normatively speaking, there would be anything *lost* if we allowed states to consider immigration status. In other words, there may be no normative reasons to allow state consideration of immigration status, but are there normative reasons to prohibit it?

#### 4. *Equal Protection's Anti-Subordination Function*

Even if the preemptionists' arguments were correct—if preemption better explained existing case law, and if immigration status were morally relevant for state policymakers—it would still be proper to apply strict scrutiny.

While it is true that one reason to apply strict scrutiny is to prevent states from basing policymaking on factors that are morally irrelevant, that is only one reason for strict scrutiny. Another reason is to protect specific groups from subordination.<sup>277</sup> And that reason for strict scrutiny applies with all possible force to noncitizens.<sup>278</sup>

As the Supreme Court has written, “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”<sup>279</sup> The concern behind equal-protection doctrine as applied to immigration is not just that states can't have a good reason for discriminating against noncitizens; it's that discrimination against noncitizens is an especially invidious evil.

The anti-subordination rationale is well-grounded in precedent. *Graham* itself held that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority, for whom such heightened judicial solicitude is appropriate.”<sup>280</sup> It did not, however, explain what makes them “discrete and insular,” noting instead that they are functionally similar to citizens: “[a]liens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in *Shapiro*, aliens may live within a state for many years, work in the state and contribute to the economic growth of

277. On equal protection as anti-subordination, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007–10 (1986).

278. See Koh, *supra* note 264, at 97 (preemption analysis “recognizes no independent constitutional norm constraining federal government discrimination against aliens”).

279. *Plyler v. Doe*, 457 U.S. 202, 213 (1982); see Condon, *Equal Protection Exceptionalism*, *supra* note 28, at 571.

280. *Graham*, 403 U.S. at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)).

the state.”<sup>281</sup> *Flores de Otero* similarly noted that both federal power and anti-subordination support strict scrutiny, without explaining in much detail why noncitizens are a suspect class.<sup>282</sup> So why is the class suspect?

Harold Koh, defending the necessity of equal protection, asked his readers to imagine noncitizens’ equal-protection claims from the perspective of those noncitizens themselves: those noncitizens “rarely protest that they have been discriminated against by the wrong level of government, or that the President and Congress have not authorized the states to discriminate against them.”<sup>283</sup> Instead, they have argued that they have not been treated by the state to which they pay taxes, whose economy they support, whose schools their children attend, and in whose cultural life they share, with the equal regard and dignity that the state shows to others who do the same.<sup>284</sup>

Preemption is an awkward substitute for these principles. True, preemption doctrine has sometimes been put to work to protect noncitizens from subordination. As Hiroshi Motomura notes, undocumented people are frequently compelled to bring preemption claims as a way of vindicating interests that might otherwise have been protected by equal protection.<sup>285</sup> Jennifer Chacón writes that this is particularly true in the context of actions by state law enforcement officials, where the difficulty of addressing real concerns about discriminatory enforcement of state laws compelled noncitizens to frame their challenges as preemption challenges.<sup>286</sup>

But preemption doctrine doesn’t capture the basic truth that xenophobia is a pervasive and profound threat. Anti-immigrant prejudice is real. The President of the United States has used language that equates undocumented immigrants with vermin: “Democrats are the problem. . . . [t]hey don’t care about crime and want illegal immigrants, no matter how bad they may be, to pour into and infest our Country, like MS-13 . . . .”<sup>287</sup> Social science shows such metaphors in political rhetoric have powerful

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281. *Id.* at 376 (quoting *Leger v. Sailer*, 321 F. Supp. 250, 253 (E.D. Pa. 1970)).

282. *See supra* note 260.

283. Koh, *supra* note 264, at 100.

284. *Id.* (“[T]heir complaint was that, for reasons unrelated to their qualities as *individuals*, they had not been treated as members of the community to which they thought they belonged.”).

285. Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1736 (2010) (“Given the obstacles to equal protection claims by unauthorized migrants, preemption has become the challenge of choice, and thus the focus of judicial opinions.”).

286. Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012) (discussing *Arizona v. United States*, 567 U.S. 387 (2012)).

287. @realDonaldTrump, TWITTER, (June 19, 2018, 10:52 AM), <https://twitter.com/realDonaldTrump/status/1009071403918864385> [<https://perma.cc/D5JB-M8ZT>].

effects, provoking feelings of disgust and bolstering anti-immigrant policy views.<sup>288</sup>

Social scientists have documented the remarkable extent to which anti-immigrant feelings are a driving force in U.S. politics.<sup>289</sup> For example, feelings about immigration motivate switches in party affiliation from Democrat to Republican in a way that feelings about other political issues do not.<sup>290</sup> And when localities create laws or policies that are hostile to noncitizens' interests, it is political partisanship, rather than demographic change, that best accounts for that decision.<sup>291</sup> Indeed, as Condon notes, the history of American xenophobia is evident in decisions of the Supreme Court which are themselves examples of anti-immigrant prejudice.<sup>292</sup> The plenary-power doctrine originated in *Chae Chan Ping*, which grounded its reasoning on racist fantasies about the need to protect the country from "vast hordes" of foreign nationals.<sup>293</sup> Equal-protection doctrine, as Koh writes, "guards against state discrimination against resident aliens based on careless or unthinking stereotyping."<sup>294</sup> Such stereotyping plays a dramatic role in immigration policymaking today.<sup>295</sup> As long as it does, strict scrutiny will be necessary.

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288. Tom Jacobs, *How Metaphor Can Be a Potent Tool in Fostering Anti-Immigrant Sentiment*, PAC. STANDARD (Feb. 1, 2019), <https://psmag.com/social-justice/how-our-political-language-provokes-anti-immigrant-anger> [https://perma.cc/SQ62-NG8T] (discussing Shantal R. Marshall & Jenessa R. Shapiro, *When "Scurry" vs. "Hurry" Makes the Difference: Vermin Metaphors, Disgust, and Anti-Immigrant Attitudes*, 74 J. SOC. ISSUES 774 (2018)).

289. See MARISA ABRAJANO AND ZOLTAN L. HAJNAL, *WHITE BACKLASH: IMMIGRATION, RACE, AND AMERICAN POLITICS* (2015).

290. *Id.* at 88–112.

291. Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2107 (2013).

292. Condon, *Equal Protection Exceptionalism*, *supra* note 8, at 597–98 (citing *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 726 (1893)).

293. *Chae Chan Ping*, 130 U.S. at 606.

294. Koh, *supra* note 264, at 93. Moreover, preemption doctrine can cut both ways: the same preemption principles that supported a challenge to anti-immigrant legislation in Arizona can be used to challenge state pro-immigrant policies, like "sanctuary" policies. See Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 375 (2013). Interestingly, a note in the *Yale Law Journal* suggests that preemption would be more protective of undocumented people than equal protection. *State Burdens on Resident Aliens: A New Preemption Analysis*, *supra* note 242, at 953 ("Finally, federal preemption would supersede any attempts by states to regulate illegal aliens. Although there obviously has been no congressional decision to admit illegal aliens, illegal immigration so profoundly affects American foreign relations that any regulatory approach must yield to the superior federal interest."). The note also suggests that under preemption analysis, states could not exclude noncitizens from teaching in public schools, even though the Supreme Court has interpreted the Equal Protection Clause to allow their exclusions from those jobs. *Id.* at 956; see *Ambach v. Norwich*, 441 U.S. 68, 81 (1979).

295. See Ming Hsu Chen, *Leveraging Social Science Expertise in Immigration Policymaking*, 112 NW. U. L. REV. ONLINE 281 (2018).



One objection to this line of argument is to demand why, if anti-subordination is the purpose of the doctrine, strict scrutiny does not also apply to the federal government when it discriminates against noncitizens. Of course, it is a conceptual necessity that noncitizens be treated differently from citizens when the federal government makes immigration law, that is, when it regulates admission and removal. Otherwise everyone would be a citizen. But it is possible to imagine a world in which strict scrutiny applies to federal alienage law—that is, laws governing the treatment of noncitizens during their stay. If the purpose of strict scrutiny is anti-subordination, why is federal discrimination against noncitizens (in the context of alien law) any less offensive to the Constitution?

One answer, of course, is that it isn't, and that we should apply strict scrutiny to federal discrimination in alienage law. Another answer is that federal discrimination against noncitizens is no less offensive to the Constitution, but must be accepted for reasons of judicial deference.

The plenary power, according to Koh, is not really a power at all.<sup>296</sup> It's a doctrine of judicial deference, not equal protection. On this theory, federal discrimination against noncitizens receives deferential review “not because federal alienage discrimination is any less offensive to the substantive norm guiding the court's review, but because the countervailing considerations insulating that federal conduct from judicial review are significantly greater.”<sup>297</sup> Courts must allow federal discrimination against noncitizens not because it is inoffensive, but because it has foreign-policy implications that are beyond courts' competence, or because immigration is fundamental to national sovereignty and must therefore be consigned to the Executive Branch, or some such reason.

If federal discrimination against noncitizens is just as offensive to the Constitution's substantive values as discrimination by states, then there is no inconsistency to resolve: the anti-subordination rationale applies to all instances of discrimination against noncitizens, even if courts do not always have the power to stop it.

Whatever position we take on federal discrimination against noncitizens, the normative case for equal protection of noncitizens against state discrimination is clear. The anti-subordination rationale is strong, and completely independent of the federal-power rationale for strict scrutiny.

We've seen, then, that Supreme Court precedents don't support the preemption-only view. We've also seen that there is no good reason to allow states to discriminate against noncitizens, because immigration isn't their business. And, finally, we've seen that there are very good reasons to bar states from discrimination, because the Equal Protection Clause aims to stop the subordination of groups like noncitizens. Put together, these considerations make a compelling case for the application of strict scrutiny.

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296. Koh, *supra* note 264, at 99.

297. *Id.*

tiny to noncitizens. The next section applies this analysis to discriminatory cooperative federalism.

C. *Strict Scrutiny Should Apply Whenever States Have a Choice*

The previous section left us with two rationales for strict scrutiny. The first is ensuring that states don't justify their policies with morally irrelevant factors. The second is preventing subordination. The question, then, is to what extent these rationales require the application of strict scrutiny to actions that states take as part of discriminatory-cooperative-federalism schemes. This section will argue that both rationales militate in favor of applying strict scrutiny whenever states have discretion. And so do other concerns.

1. *The Rationales for Strict Scrutiny Apply to Discriminatory Cooperative-Federalism Schemes*

As the previous section explained, there are two reasons for the application of strict scrutiny to congressionally supported state discrimination against noncitizens. The first is ensuring that states don't justify their policies with morally irrelevant factors. The second is preventing subordination of noncitizens.

It can be argued that federal approval undercuts the first reason for strict scrutiny. The first reason, remember, is that immigration-related considerations are not the states' business. If the federal government approves of states making immigration their business, then this rationale arguably no longer applies. With federal approval, immigration status ceases to be morally irrelevant.

This argument only works to the extent that the federal government has the power to make immigration the states' business. All of the arguments above about the limits on *Congress's* power (the uniformity and anti-delegation arguments) come into play here. If non-uniformity in immigration rules threatens foreign relations, for example, then Congress should not have the power to give states discretion and create a patchwork of laws affecting noncitizens.<sup>298</sup> Likewise, there is good reason not to apply the plenary-power doctrine, under which the federal government is entitled to deferential equal-protection review, to federal statutes that try to support state discrimination. The state laws we are discussing do not involve entry and removal, the topics of what is sometimes called "immigration law," as opposed to "alienage law." There are therefore good reasons to limit the plenary power in this area, and doing so makes more sense than extending that plenary power to states acting under the un-

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298. See *Arizona v. United States*, 567 U.S. 387, 395 (2012) ("It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States." (citing *Chy Lung v. Freeman*, 92 U.S. 275, 279–80 (1876))).

brella of congressional support. So the first justification for strict scrutiny still stands: states should not be allowed to discriminate on the basis of immigration status because nothing makes immigration status the states' business.

And the second justification for strict scrutiny is not affected in the least by federal approval. Noncitizens, who cannot vote, are undoubtedly the subject of irrational bias. The anti-subordination rationale for strict scrutiny is not diminished by federal approval of state discrimination. To be sure, the federal government itself has the power to discriminate without passing strict scrutiny, but (as argued above) this does not make the discrimination any less problematic.

Even if it were true that congressional support for state discrimination puts the two rationales for strict scrutiny into conflict, there is no reason to think that the two rationales are an either/or proposition. Rather, both rationales address separate concerns: that states will act without justification, and that states will subordinate politically disempowered groups. Where one rationale is not present, but the other is, strict scrutiny should nonetheless apply.

As an alternative to looking at the reasons why scrutiny is sometimes strict, we might look at the reasons for why scrutiny is sometimes relaxed, to see if they apply to discriminatory cooperative federalism. As Gerald Neuman writes, "Congressional discrimination receives deference because it is presumed to reflect the weighing of factors that the states are neither likely nor constitutionally competent to assess."<sup>299</sup> But these reasons for deference don't apply once Congress punts decisions about discrimination to the states: "Congress's abdication of the eligibility issue to the states would demonstrate that these considerations of foreign policy and national sovereignty do not require ineligibility for state benefits."<sup>300</sup>

Supreme Court precedent confirms that strict scrutiny should apply regardless of whether Congress purports to authorize state discrimination. As Condon points out, the Supreme Court answered this question in 1969 in a related context, when it struck down a state requirement that welfare applicants have resided in the state for a certain amount of time.<sup>301</sup> Congress had created a statutory framework which appeared to authorize a one-year residence requirement.<sup>302</sup> The Supreme Court said, "even if we were to assume, arguendo, that Congress did approve the imposition of a

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299. Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1439 (1995).

300. *Id.*

301. *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); Condon, *Equal Protection for Immigrants*, *supra* note 2, at 132 n.221.

302. *See Shapiro*, 394 U.S. at 645 (Warren, C.J., dissenting) ("Congress intended to authorize state residence requirements of up to one year.").

one-year waiting period, it is the responsive state legislation which infringes constitutional rights.”<sup>303</sup>

The Court explained that the federal statute “[b]y itself” had “absolutely no restrictive effect.”<sup>304</sup> Thus, it was “not that statute but only the state requirements which pose the constitutional question.”<sup>305</sup> And “Congress may not authorize the States to violate the Equal Protection Clause.”<sup>306</sup>

## 2. *Practical Reasons for Strict Scrutiny*

There are also strong practical reasons to apply strict scrutiny to state discrimination even when it has congressional support. One such reason is accountability, a concern often raised with cooperative-federalism schemes.<sup>307</sup> When Congress and the states work together on a program, it can be challenging for voters to know whom to hold accountable.<sup>308</sup> Whether or not this concern is a compelling one (in light of voters’ general lack of awareness of which policymakers bear responsibility for any given decision), it has been embraced by the Supreme Court, particularly in its commandeering cases.<sup>309</sup> And it would be relatively easy to articulate accountability concerns about the discriminatory cooperative federalism schemes described in this Article. In those schemes, remember, Congress makes discrimination against a politically disempowered group possible not by mandating it, but by giving states a choice. That’s already opaque to voters: whose fault is the discrimination? But the accountability problem becomes much worse if Congress’s grant of discretion has the incidental effect of radically altering the level of scrutiny that will be applied by the courts. Now the fault belongs to Congress, and the states, and the judges, and perhaps the Constitution itself. If the only way Congress can cause state discrimination is by mandating it, voters will at least know whom to hold accountable.<sup>310</sup>

Another practical reason is workability. Remember that Judge Bybee, and others who think equal-protection analysis should be replaced by pre-emption doctrine, argue that equal-protection doctrine has too many exceptions to be workable.<sup>311</sup> Their solution to this problem is to abolish

303. *Id.* at 641.

304. *Id.*

305. *Id.*

306. *Id.*

307. *See* *New York v. United States*, 505 U.S. 144, 168 (1992).

308. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 826 (1998) (noting that the accountability concerns invoked in the Supreme Court’s anti-commandeering cases seem to apply equally to all cases of cooperative federalism).

309. *See New York*, 505 U.S. at 168.

310. Carrasco notes that this would force elected representatives in Congress to make the difficult decision. Carrasco, *supra* note 2, at 628.

311. *Korab v. Fink*, 797 F.3d 572, 585 (9th Cir. 2014) (Bybee, J., concurring).

the doctrine entirely, so that noncitizens are no longer constitutionally protected against discrimination. As discussed above, there isn't much reason to see this as a real problem; there are exceptions to strict scrutiny for undocumented people; for public employment where the employee will serve a political function; and (according to two circuits) for people with temporary visas.<sup>312</sup> It seems early to declare this doctrine too riddled with holes to survive. But if we are sincerely concerned about keeping things simple, we may as well not create a new exception for cases in which the federal government has expressed approval of the discrimination at issue.

Aside from the practical concerns, there are also separation-of-powers issues with any scheme in which Congress can immunize state action from judicial scrutiny. As Roger Hartley writes, "The intended legal effect of PRWORA's devolution provisions is to render lawful some state welfare-eligibility policies that the judiciary otherwise would hold are unconstitutional."<sup>313</sup>

So the arguments against relaxing scrutiny are strong. Interestingly, even Judge Bybee, whose views on the subject are so extreme that he wants to do away with equal-protection scrutiny of anti-immigrant discrimination altogether, concedes that if it weren't for preemption principles, congressional authorization wouldn't suffice to defend against an equal-protection claim.<sup>314</sup> "[W]hatever reasons the federal government may offer for its own discrimination policy," he writes, "the states cannot rely on that same justification."<sup>315</sup> "The states must supply their own sovereign reasons and cannot cite the reasons of a coordinate government."<sup>316</sup>

#### D. *What Level of Discretion Triggers Strict Scrutiny?*

Now that we've made a case for applying strict scrutiny, it's time to circle back to the observation made early in the Article about the ways in which "discretion" is in fact a spectrum. Discriminatory cooperative federalism is not one kind of scheme, but many, and some of these schemes give states more discretion than others. So the last problem, once we've decided to apply strict scrutiny to cases of discretion, is to decide exactly how far Congress can restrict states' choices before discretion becomes an illusion. So the Article will end by drawing boundaries around the analysis

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312. Two circuits have created an exception for temporary noncitizens too. See *League of United Latin Am. Citizens v. Bradesen*, 500 F.3d 523, 533 (6th Cir. 2007); *LeClerc v. Webb*, 419 F.3d 405, 410 (5th Cir. 2005), hearing en banc denied, 444 F.3d 428; *Toll v. Moreno*, 458 U.S. 1, 44–45 (1982) (Rehnquist, J., dissenting).

313. Hartley, *supra* note 2, at 102.

314. *Korab*, 797 F.3d at 597–98 (Bybee, J., concurring) ("In sum, if we looked exclusively to equal-protection principles, I think it is likely that Hawai'i's law would fall.").

315. *Id.* at 597 (Bybee, J., concurring).

316. *Id.* (Bybee, J., concurring).

it's been working to develop: at a certain point, we're no longer talking about cooperative federalism at all.

Specifying the conditions under which strict scrutiny should apply will be more complicated than most commentators have yet seen. As Part I explained, above, federal statutes that support state discrimination against noncitizens take numerous forms. Some statutes purport to "authorize" discrimination, while others purport to allow states to discriminate provided they meet certain conditions. Assuming the arguments above are correct, and strict scrutiny applies to at least some of these statutes, to which should it apply?

Nobody (so far as I'm aware) has argued that strict scrutiny should apply when the federal government uses its preemption power to outright require a denial of benefits.<sup>317</sup> The question, then, is what level of scrutiny applies when states have some measure of freedom to choose whether to discriminate.<sup>318</sup>

We should begin with the test adopted by the Supreme Judicial Court of Massachusetts in *Finch*, which asked whether the federal law "deprives the Commonwealth of autonomy and renders [the state policy] something other than an action undertaken solely by the Commonwealth."<sup>319</sup> The test for discretion, then, is whether federal law mandates the state policy; if not, strict scrutiny applies. "Where the State is left with a range of options including discriminatory and nondiscriminatory policies, its selection amongst those options must be reviewed under the standards applicable to the State and not those applicable to Congress."<sup>320</sup>

How are we to judge whether a state has truly been left with "a range of options?" As Richard Posner once wrote, it is possible to make "dichotomous cuts in continuous phenomena."<sup>321</sup> At some point, federal law constrains state discretion so heavily that states effectively cease to have a choice. *Finch* recognized this possibility, discussing federal financial incentives under the Welfare Reform Act and finding "no principled basis for concluding increased expense somehow deprives the Commonwealth of autonomy."<sup>322</sup> With the power to not discriminate comes the responsibility to not discriminate.

One question that arises when we try to apply this analysis is how to treat situations where Congress imposes a requirement of discrimination

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317. Rosenberg comes closest, arguing that states could simply choose to fund their own programs for aliens to stand alongside a joint-funded program. Rosenberg, *supra* note 2, at 1458–59; *id.* at 1465–68. But that's not true in the case of a direct prohibition on state-provided benefits.

318. For an analysis of the level of scrutiny that should apply to joint federal/state programs, see Wurzburg, *supra* note 2.

319. *Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 674 n.19 (2011).

320. *Id.* at 674.

321. RICHARD A. POSNER, PROBLEMS OF JURISPRUDENCE 46 (1993).

322. *Finch*, 459 Mass. at 274 n.19.

as a condition of participation in Medicaid. To withdraw from Medicaid would impose an immense burden on people within a state and on the state government itself. But the analysis above suggests that strict scrutiny applies whenever states have a choice. States have a choice about whether to participate in Medicaid.<sup>323</sup> Must states then choose between withdrawing from Medicaid altogether, and creating a supplemental program to make up for the funds denied to noncitizens?

The First Circuit has concluded that “[t]he Equal Protection Clause does not place the state in such a Procrustean bed.”<sup>324</sup> The court acknowledged that “*Congress discriminated*” in the Welfare Reform Act, but held that this “does not also establish alienage-based discrimination by Maine merely because of its continued Medicaid participation and required compliance with [the act].”<sup>325</sup> If the state wasn’t discriminating by choosing to participate in a discriminatory scheme, then what was it doing? “[I]f Maine can be said to have ‘discriminated’ at all, it only did so on the basis of federal Medicaid eligibility, a benign classification subject to mere rational basis review.”<sup>326</sup>

This is pretty unsatisfying. Imagine that the Republic of Scarti, a wealthy island off the coast of the United States with a racist government, creates a program to support Americans in coastal areas affected by natural disasters, offering matching funds to state governments that help people rebuild their homes. The grants will be administered by the states. There is only one condition: the Scartian funds can only be used to help white people. In accepting the Scartian funds, a state is arguably discriminating not on the basis of race but on the basis of eligibility for Scartian funds. But this doesn’t make the practice any less objectionable.

In general, then, states can’t excuse their own discriminatory actions by saying they were merely participating in a cooperative-federalism scheme. Participation in such schemes is a choice. To be sure, states often benefit financially from participation in such schemes; that’s how Spending Clause programs work. But it’s no excuse to say that foregoing participation in the cooperative-federalism scheme would cost the state money. As Condon writes, “*Graham* treated citizens and lawful permanent residents similarly situated based upon their shared contributions and burdens of community membership, not a comparative economic assessment of what it would cost to treat them equally.”<sup>327</sup>

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323. *Bruns v. Mayhew*, 750 F.3d 61, 70 (1st Cir. 2014) (“The fact that Maine voluntarily participated in Medicaid does not alter our analysis. By the appellants’ logic, Maine’s continued voluntary participation in Medicaid and compliance with PRWORA violated the Equal Protection Clause, requiring the state to either withdraw from Medicaid altogether or to create an equivalent state-funded medical assistance benefit for PRWORA-ineligible aliens.”).

324. *Id.*

325. *Id.*

326. *Id.* at 70; see *Hong Pham v. Starkowski*, 16 A.3d 635, 659 (Conn. 2011); cf. *Soskin*, 353 F.3d at 1255–56.

327. Condon, *Equal Protection for Immigrants*, *supra* note 2, at 139.

Still, some choices are more free than others. There may be situations where the federal government exerts enormous economic pressure on states in a way that effectively forces them to participate in a discriminatory program. In such cases, courts have strongly resisted claims that when a state participates in a discriminatory federal scheme, it takes on an obligation to provide equivalent benefits to the noncitizens who are left out.

As we've seen, the First Circuit objected to the idea that participation in Medicaid could carry with it an obligation to separately fund programs for noncitizens that match what Medicaid denies them. Perhaps one reason for the court's objection was that the cost of not participating in Medicaid is so high. The program is gargantuan, accounting for more than a quarter of state budgets.<sup>328</sup> Perhaps it simply seemed unfair to force the state to create a new program on the side as a condition of allowing it to participate in Medicaid because Medicaid is so important that it's functionally not optional.

This is the far end of the discretion spectrum: situations in which state discretion comes under heavy pressure from the federal government. Recall that two major kinds of cooperative federalism take the form of a carrot and a stick.<sup>329</sup> Congress can induce state participation in federal schemes by offering funds to states that join them, or by threatening to preempt states that don't. These inducements can be more or less heavy-handed.

When Congress threatens preemption, it can make it easy for states to avoid preemption, or all but impossible. One provision of the Welfare Reform Act says that states can't give public benefits to undocumented immigrants unless the state's legislature specifically passes a statute authorizing the benefits. In other words, states are preempted unless their legislature acts. This is a high bar to clear; legislative action doesn't come easily.<sup>330</sup>

Similarly, when Congress offers funds to incentivize state participation in cooperative-federalism schemes, it can be more or less heavy-handed. In several of the cases discussed above, Congress imposed a requirement of discrimination on states as a condition of their participation in Medicaid. The Supreme Court has told us that Medicaid is such a huge component of states' budgets that it's unconstitutionally coercive for Congress to threaten to kick states out of the Medicaid program.<sup>331</sup> "Do X or lose your Medicaid funding," in other words, isn't a real choice at all.

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328. *Medicaid's Share of State Budgets*, MEDICAID & CHIP PAYMENT ACCESS COMM'N (MACPAC), <https://www.macpac.gov/subtopic/medicaids-share-of-state-budgets/> [<https://perma.cc/PY8B-VYM5>].

329. See *supra* note 34.

330. I've argued elsewhere that this provision imposes a burden that isn't just *hard* to clear, but also *intrusive* in constitutionally impermissible ways. Ayers, *supra* note 43.

331. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601–05 (2012).



This, then, is the answer to arguments that states have no meaningful choice but to participate in a discriminatory federal program. If states really have no choice at all, they are being coerced, and Congress has exceeded its Spending Clause authority. If states do have a choice, then the program is not just a federal program but also a state program, and they have a concomitant obligation to make sure that the program does not discriminate by providing, without federal support, benefits for the noncitizens who are left out.

A similar answer will suffice to deal with concerns about the “stick” side of cooperative federalism. If a state is given a choice between discriminating and being preempted, the question for courts is whether the choice is a meaningful one. If so, strict scrutiny applies. In some cases, the choice may be illusory. For example, 8 U.S.C. § 1621 preempts any state action that gives benefits to noncitizens unless the state legislature passes a statute specifically authorizing it.<sup>332</sup> As I’ve argued in a previous article, that’s unconstitutionally intrusive on state sovereignty, because it’s none of Congress’s business which branch of state government decides whether noncitizens should get benefits.<sup>333</sup> So this statute doesn’t provide a meaningful choice, and states shouldn’t be subject to strict scrutiny for whatever choice they make under it. As long as states do have a choice, however, strict scrutiny should apply.

In sum, when we examine all of these complicated questions about how to analyze the state role in cooperative-federalism schemes, we come back to a relatively simple answer. As long as states have a meaningful choice, strict scrutiny applies.

#### CONCLUSION

Cooperative-federalism schemes involve two actors, each of whom is subject to their own constraints. So it’s not necessary to develop a unified theory of what’s problematic about cooperative-federalism schemes that aim to encourage discrimination. Those schemes can be challenged in multiple ways.

This Article has outlined four major challenges to cooperative-federalism schemes that result in discrimination against noncitizens. Three of those challenges are aimed at the federal government’s actions, and one of them (though it is the most complicated) aims at the state’s actions. It is important to note, though, that other challenges may be available. Because states play a role in cooperative-federalism schemes, challenges can be made under whatever distinctive provisions exist in the relevant state’s constitution. And of course the federal statute at issue may be subject to creative interpretation that undermines the attempt to discriminate.

The upshot of all this is that while cooperative-federalism schemes may seem to federal legislators a good way to encourage discrimination

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332. 8 U.S.C. § 1621(d) (2018).

333. Ayers, *supra* note 43.

without shouldering the blame for it (because states, after all, take the final step that actually denies benefits to noncitizens), those schemes in fact make possible a variety of challenges that would not be available if Congress had simply effected the discrimination itself. The tools of discriminatory cooperative federalism examined in this Article may have seemed, to Congress, like shortcuts around various legal and political roadblocks. But for every shortcut, there is a cogent legal challenge waiting to be made.